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Notes

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Medical Malpractice: Informed Consent to the Locality Rule

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I. INTRODUCTION

Medical malpractice litigation is not a modern phenomenon.[1] In the last decade, however, it has reached what some believe to be crisis proportions.[2] A report printed in 1974 showed that malpractice claims were increasing at the rate of eight to nine percent per year.[3] Because only a small proportion of medically related injuries results in malpractice claims,[4] there is a great probability that malpractice suits will increase as patients become more aware of legal remedies.

Two legal doctrines, res ipsa loquitur and informed consent, are regarded by the medical profession as the legal foundation for the expansion in malpractice liability.[5] During the period in which these doctrines have found increasing acceptance in the courts, an older legal doctrine, the locality rule, has come under increasing attack. The purpose of this Article is to demonstrate that informed consent and the locality rule are not incompatible. The two doctrines are

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[1]*See* Landon v. Humphrey, 9 Conn. 209 (1832); Grannis v. Branden, 5 Day 260 (Conn. 1812); Cross v. Guthery, 2 Root 90 (Conn. 1794); Seare v. Prentice, 103 Eng. Rep. 376 (K.B. 1807); Slater v. Baker, 95 Eng. Rep. 860 (K.B. 1767); Hill v. Cheyndut, London Guild Hall Plea and Memoranda Rolls (Roll A. Feb. 13, 1377).

[2]*See generally* STAFF OF HOUSE COMM. ON INTERSTATE & FOREIGN COMMERCE, 94th Cong., 1st Sess., AN OVERVIEW OF MEDICAL MALPRACTICE (Comm. Print 1975). [hereinafter cited as STAFF REPORT].

[3]*Id.* at 5 (citing AM. MED. NEWS, Nov. 4, 1974).

[4]A study of 23,750 discharges from two hospitals showed that 517 patients received injuries from improper medical treatment. Only 31 malpractice claims were filed during the year in which the study was made. Since there were only 12,600 malpractice claims throughout the nation in 1970 and 30 million hospital admissions, it appears that only a small fraction of medical injuries results in malpractice claims. STAFF REPORT, *supra* note 2, at 5.

[5]*Id.* at 24-25.

founded upon similar considerations, and informed consent may be used to give new vitality to the locality rule.

II. The Locality Rule

A. Development

Due to the reluctance of judges to impose a standard on a profession which deals with matters beyond the judges' knowledge, medical custom is the standard generally used to determine negligence in medical malpractice cases.[6] This is, in effect, a reasonable man standard, in which the reasonable man is endowed with the skill and knowledge of the ordinary physician.[7] Historically,

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[6]*See* Pearson, *The Role of Custom in Medical Malpractice Cases*, 51 Ind. L.J. 528, 528 (1976) (citing J. Waltz & F. Inbau, Medical Jurisprudence 42 (1971)). *See also* McCoid, *The Care Required of Medical Practitioners*, 12 Vand. L. Rev. 549, 558-59 (1959).

[7]Helling v. Carey, 83 Wash. 2d 514, 519 P.2d 981 (1974), cast some doubt on whether custom would continue to be an element in medical malpractice claims. In that case, the Washington Supreme Court refused to consider a well-established custom of ophthalmologists not to administer glaucoma tests routinely to patients under age 40. The court stated: "The issue is whether the defendants' compliance with the standard of the profession of ophthalmology . . . should insulate them from liability under the facts in this case . . . ." *Id.* at 517, 519 P.2d at 982. The court, impressed by the fact that the test was easy to conduct, harmless, and relatively inexpensive, held that custom was not determinative of liability. *Id.* at 518, 519 P.2d at 983.

Custom should prevail as the standard used to determine negligence in medical malpractice cases. Judges and juries are unable to determine the standard, and juries are too sympathetic. *See* Morris, *Custom and Negligence*, 42 Colum. L. Rev. 1147, 1164-65 (1942). Further, since the doctor might lose his good reputation, in addition to the amount of the judgment, and since "[t]he reasonably prudent man 'test' would enable the ambulance chaser to make a law suit out of any protracted illness," custom is the preferred rule. *Id.* at 1165. It has also been urged that the physician's judgment is an art which should freely serve the patient without any interference with his "developed instinct in diagnosis and treatment." McCoid, *supra* note 6, at 608. For a summary of those that favor, oppose, or simply recognize custom as the standard, *see* King, *In Search of a Standard of Care for the Medical Profession: The "Accepted Practice" Formula*, 28 Vand. L. Rev. 1213, 1245 n.128 (1975).

Helling, it has been predicted, will not be followed. *See* Pearson, *supra* note 6, at 534. This prediction is, thus far, an accurate one. The commentary on *Helling* has been extremely negative. *See, e.g.*, Curran, *Glaucoma and Streptococcal Pharyngitis: Diagnostic Practices and Malpractice Liability*, 291 New England J. Med. 508 (1974); 28 Vand. L. Rev. 441 (1975). There is, however, some support for *Helling*. *See, e.g.*, Dusinberre, *Diagnostic Screening and Malpractice*, 292 New England J. Med. 597 (1975); Note, *Comparative Approaches to Liability for Medical Maloccurrences*, 84 Yale L.J. 1141 (1975).

The courts have largely ignored the *Helling* decision. Only one case outside the state of Washington has cited *Helling*. In Barton v. Owen, 71 Cal. App. 3d 484, 139 Cal. Rptr. 494 (1977), the plaintiff alleged that the doctors' failure to timely perform a culture and sensitivity test, to take x-rays, to provide antibiotics, and to drain the infection constituted negligence. The court noted that situations can arise wherein common knowledge shows that a physician was negligent. *Id.* at 494, 139 Cal. Rptr. at 499.

the conflict in applying the standard has been in determining the test for the skill and care of the ordinary physician.

In the United States, the locality rule has traditionally resolved the conflict by formulating the test in terms of the skill and care of the average physician in the community or in communities similar to the one in which the physician practices. This rule was unknown to the common law of England.[8] Indeed, it was not introduced in the United States until the latter part of the nineteenth century.[9] Early cases in the United States did not consider locality in determining the standard of skill and care.[10] Prior to the development of the locality rule, the American standard was formulated as follows: "A physician or surgeon is only responsible for ordinary care and skill, and for the exercise of his best judgment in matters of doubt. He is not accountable for a want of the highest degree of skill."[11] The rule was much the same in England:

> If a Physician . . . undertakes the cure of any wound or disease, and by neglect or ignorance the party is not cured . . . such medical attendant is liable to damages in an action of trespass on the case: but the person must be a *common Surgeon*, or one who makes public profession of such business, . . . for otherwise it was the plaintiff's own folly to trust to an unskilful person, unless such person *expressly* undertook the cure, and then the action may be maintained against him also.

However, no cases were cited where the well-established custom of physicians was held to be negligent as a matter of common knowledge. Thus, to the extent that *Helling* held that a medical custom could be negligent as a matter of law, it can be distinguished from *Barton*.

Even the Washington appellate courts have noted that *Helling* was to be limited to the "unique" facts of that case. *See* Swanson v. Brigham, 18 Wash. App. 647, 651, 571 P.2d 217, 219 (1977); Meeks v. Marx, 15 Wash. App. 571, 577, 550 P.2d 1158, 1162 (1976). Further, a recent case stated that the *Helling* rule was abolished by statute. Gates v. Jensen, 579 P.2d 374, 376 (Wash. App. 1978).

Thus, the *Helling* rule does not appear to have any continuing vitality. This discussion will, consequently, assume that proof of custom is an essential element of a medical malpractice action.

[8]H. NATHAN, MEDICAL NEGLIGENCE 21 (1957).

[9]*See* Siirila v. Barrios, 398 Mich. 576, 248 N.W.2d 171 (1976); Shier v. Freedman, 58 Wis. 2d 269, 206 N.W.2d 166 (1973); McCoid, *supra* note 6, at 569; Meisel, *The Expansion of Liability for Medical Accidents: From Negligence to Strict Liability by Way of Informed Consent*, 56 NEB. L. REV. 51, 66 n.41 (1977); Waltz, *The Rise and Gradual Fall of the Locality Rule in Medical Malpractice Litigation*, 18 DE PAUL L. REV. 408, 410 (1968); Comment, *Standard of Care for Medical Practitioners—Abandonment of the Locality Rule*, 60 KY. L.J. 209, 210 (1971).

[10]Meisel, *supra* note 9, at 66 n.41 (citing McCandless v. McWha, 22 Pa. 261 (1853)).

[11]Simonds v. Henry, 39 Me. 155 (1855). *See* F. WHARTON & M. STILLE, TREATISE ON MEDICAL JURISPRUDENCE § 1273 (2d ed. 1860) (citing Leighton v. Sargent, 27 N.H. 460 (1853)).

> "And it seems that any deviation from the established mode of practice, shall be deemed sufficient to charge the Surgeon . . . ."[12]

Although these early cases did not expressly include the locality rule, they did not exclude it.[13] At most, they were silent on the issue of which geographic areas one should consider to determine the relevant standard. Implicit in the American rule and explicit in the English rule, however, was the concept that consent to the degree of skill affects the standard to be applied. In other words, a patient could expressly consent to a standard lower than the ordinary standard established by the profession.

Early American decisions illustrate the patient's right to choose the standard to be applied in the formation of his contract for treatment. If the standard established by the contract was not met, an action would sound in tort. In *McCandless v. McWha*,[14] the plaintiff alleged that the physician's improper treatment of a broken leg caused one leg to become shorter than the other. The Pennsylvania Supreme Court stated:

> We have stated the rule to be reasonable skill and diligence; by which we mean such as thoroughly educated surgeons ordinarily employ. If more than this is expected, it must be expressly stipulated for; but this much every patient has a right to demand in virtue of the *implied contract* which results from intrusting his case to a person holding himself out to the world as qualified to practice this important profession.[15]

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[12]J. PARIS & J. FONBLANQUE, 1 MEDICAL JURISPRUDENCE 80 (1823) (citations omitted).

[13]One author stated that if the locality rule had been suggested in England, it probably would have been rejected. H. NATHAN, *supra* note 8, at 21. In a compact country like England, however, it is easier to establish a national standard than in the United States. Fleming, *Developments in the English Law of Medical Liability*, 12 VAND. L. REV. 633, 641 (1959). "[I]t is nonetheless significant that the American practice has been equally rejected in the Dominions where social conditions bear a strong resemblance to those prevailing in the United States." *Id.* (footnotes omitted).

[14]22 Pa. 261 (1853).

[15]*Id.* at 268 (emphasis added). In Smothers v. Hanks, 34 Iowa 286, 290 (1872), the court noted: "The case of McCandless v. McWha . . . is so often cited . . . that we deem it proper to give it here a somewhat extended analysis." The Iowa Supreme Court found certain inconsistencies in the *McWha* opinion that relate to the standard of care, but the holding in the case that an implied contract is the basis of the standard of care was not questioned. The *Smothers* court noted that *McWha*, at times, appeared to require the skill and care of the ordinary physician, but, at other times, appeared to require the skill and care of thoroughly educated physicians. *Smothers* concluded that ordinary care was the correct standard. *Id.* at 292.

This court would require a person who holds himself out as a physician to possess the skill of an ordinary physician. The reason for this minimum standard was the implied contract resulting from the undertaking to cure. Thus, the foundation for the requirement of ordinary skill is found in the law of contract, not tort. Just as a person who contracts to deliver a cow cannot fulfill the contract by delivering a pig, so, the courts determined, a party who contracts to deliver the skills of a physician cannot fulfill the contract by delivering the skills of a layman. Absent any express stipulations, a certain level of competence became an implied term of the contract.

Although the locality rule was not discussed in early cases, the rule is consistent with the decisions which held that an implied contract controlled the standard of care. If the standard of care is based on consent to a specific level of competence in a geographic area, it is logical to hold that the parties intended the standard of care in their implied contract to be the one prevailing in the locality in which the contract was formed. As will be seen, later courts have so held, although they appear to have reached this result because of the unfairness to the physician in holding otherwise. By implication, these courts reasoned that it would be unfair to hold a physician to a higher standard than that to which the parties had impliedly consented.

In *Heath v. Glisan*,[16] the plaintiff's injured elbow was permanently dislocated because of the defendant's negligence. The court stated:

> "A physician or surgeon is only responsible for ordinary care and skill, and for the exercise of his best judgment . . . ."
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> . . . .
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> By ordinary skill, is meant such degree of skill as is commonly possessed by men engaged in the same profession.
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> . . . .
>
> In determining whether the defendants possess ordinary professional skill, it is proper to consider the evidence in regard to their education, the time, and greater or less extent of their practice and experience in the profession, as well as other evidence touching the question.[17]

Presumably, it would have been permissible to show that the defendant's skill was affected by the locality in which he practiced. At the time of *Heath*, the courts were still developing the test for ordinary care. If the court found that the physician's skill was affected by the

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[16] 3 Or. 64 (1869).

[17] *Id.* at 65-67 (quoting F. WHARTON & M. STILLE, MEDICAL JURISPRUDENCE § 1273 (2d ed. 1860) (emphasis added)). *See also* Boydson v. Giltner, 3 Or. 118 (1869).

community in which he practiced, it would have been a simple step to then hold that the test of ordinary skill was determined by the standard in a particular community.[18]

The step was taken in *Smothers v. Hanks*,[19] one of the earliest cases to announce the locality rule as the test for ordinary skill and care: "It is . . . doubtless true that the standard of ordinary skill may vary even in the same state, according to the greater or lesser opportunities afforded by the locality, for observation and practice, from which alone the highest degree of skill can be acquired."[20] As support for this holding, the court cited, among other cases, *Howard v. Grover*,[21] and *Simonds v. Henry*.[22] In *Howard*, the court had merely said: "[T]he defendant is not liable for a want of the highest degree of skill, but for ordinary skill,"[23] and the *Simonds* court had stated: "[Physicians] are held responsible for injuries resulting from a want of ordinary care and skill."[24] Thus, the locality rule evolved from the general rule of ordinary skill and care. The patient consented to the ordinary skill and care that the physician had impliedly agreed to provide. Whether this standard was met would be determined by the standard in the community in which the physician practiced.[25]

Originally, courts applied the "same locality rule." *Tefft v. Wilcox*[26] appears to be the first express application of this rule in the United States. The court stated:

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[18]For other early cases, see Ritchey v. West, 23 Ill. 329 (1860); Long v. Morrison, 14 Ind. 495 (1860). The court in *Ritchey* stated: "[H]e must . . . be held to employ a reasonable amount of care and skill. . . . [H]e must possess and exercise that degree of skill which is ordinarily possessed by members of the profession. . . . This the law implies . . . ; but when the services are rendered as a gratuity, gross negligence will alone create liability." 23 Ill. at 330. *Cf.* McNevins v. Lowe, 40 Ill. 209 (1866) (holding that fees do not bear on the standard of skill and care required); Patten v. Wiggen, 51 Me. 594 (1862) (malpractice asserted as defense to physician's claim for fees).

Professor McCoid has pointed out:

> These decisions, of course, antedated any fully developed theory of negligence as a separate basis for action. Although more recent decisions have not entirely abandoned the view that the physician-patient relation is a contractual one to which certain implied undertakings attach, the emphasis today is far less on contract and far more upon the law of negligence as a basis of liability.

McCoid, *supra* note 6, at 551.

[19]34 Iowa 286 (1872).

[20]*Id.* at 289-90.

[21]28 Me. 97 (1848) (cited in 34 Iowa 286, 290).

[22]39 Me. 155 (1855) (cited in 34 Iowa 286, 290).

[23]28 Me. at 101.

[24]39 Me. at 157.

[25]*See* notes 14-16 *supra* and accompanying text.

[26]6 Kan. 46 (1870).

"There are many neighborhoods, in the west especially, where medical aid is of difficult attainment. Yet cases of disease and surgery are constantly occurring, and they must of necessity fall into the hands of those who have given to the subject but little if any thought. Thus, the inexperienced and the unlearned attend to the surgery in their way, or it is not attended to at all. . . . *In such cases no more can be expected* of the operator than the exercise of his best skill and judgment. In large towns and cities, are always found surgeons and physicians of the greatest degree of skill and knowledge. They are to be held to a corresponding high degree of responsibility. . . . In the smaller towns and country, those who practice medicine and surgery, though often possessing a thorough theoretical knowledge of the highest elements of the profession do not enjoy so great opportunities of daily observation and practical operations, where the elementary studies are brought into every day use, as those have who reside in the metropolitan towns, and though just as well informed in the elements and literature of their profession, they should not be expected to exercise that high degree of skill and practical knowledge possessed by those having greater facilities for performing and witnessing operations, and who are, or may be constantly observing the various accidents and forms of disease. It will not therefore, as a general thing, require so high a degree of knowledge to bring this class of physicians up to the rule of ordinary knowledge and skill as in places where greater facilities are afforded by which higher professional knowledge is attainable."[27]

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[27] *Id.* at 63-64 (quoting J. ELWELL, A MEDICO-LEGAL TREATISE ON MALPRACTICE AND MEDICAL EVIDENCE 22-23 (1866) (emphasis added)). The court did not accurately quote Elwell, although the quotation was substantially correct. The material referred to in Elwell reads:

> It may, at times, be difficult to determine just what the "ordinary degree of skill," as used by law writers, amounts to. It may vary in the same State or country. There are many neighborhoods, in the West especially, where medical aid is of difficult attainment; yet cases of disease and surgery are constantly occurring, and they must, of necessity, fall into the hands of those who have given to the subject but little, if any thought. Thus the inexperienced and the unlearned attend to the surgery in their way, or it is not attended to at all. In such a case, and under such circumstances, and for these reasons, the ordinary degree of skill required by law would be good common sense, or such knowledge as the operator had, joined with a good purpose to help the afflicted, even if such interference rendered the patient a cripple for life. This is the law in both England and this country. Even in England, it was said by Hullock, in the case of Van Butchell, that "many persons would be left to die if irregular surgeons were not allowed to practice."

Without question, this court would permit implied consent to a relatively low standard of care. The reason for the lower standard, whether for lack of talent, learning, or experience, seemed to be immaterial. The court noted that the basis for liability was in contract: "[The physician] is never considered as warranting a cure, unless under a special contract for that purpose; but his contract, as implied in law, is, that he possesses that reasonable degree of learning, skill and experience, which is ordinarily possessed by others of his profession . . . ."[28] Thus, the first case to expressly adopt the locality rule formulated the test for ordinary care by the law of contracts. The expectations of the patient which resulted in the legal standard of care to be applied were derived from the patient's implied consent to the standard of care in that locality.

Under the same locality rule, the standard of care in any community other than the one in which the physician practiced was immaterial.[29] If only one physician practiced in the community, he set the standard of care. If a patient was forced to agree to a lower standard because other physicians were not available, his agreement could not be truly voluntary; yet, judges implied consent out of a sense of fairness to both parties. Since the implied standard of care

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> In these cases, no more, of course, should be expected of the operator than the exercise of his best skill and judgment, however limited that might be.
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> In large cities and towns, are always found surgeons and physicians of the greatest degree of skill and knowledge. Their pretentions are properly large. They are to be held to a corresponding high degree of responsibility. They contract to do more than the ordinary physician, and they are paid a higher price for what they do; consequently the contract is more difficult to fulfill.
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> In the smaller towns and country, those who practice medicine and surgery, though often possessing a thorough theoretical knowledge of the highest elements of the profession, do not enjoy so great opportunities of daily observation, and practical operations; where the elementary studies are brought into every day use; as those have who reside in the metropolitan towns; and though just as well informed in the elements and literature of their profession, they should not be expected to exercise that high degree of skill and practical knowledge possessed by those having greater facilities for performing and witnessing operations, and who are, or may be, constantly observing the various accidents and forms of disease.
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> It will not, therefore, as a general thing, require so high a degree of knowledge to bring this class of physicians up to the rule of ordinary knowledge and skill, as in places where greater facilities are afforded, by which higher professional knowledge is attainable.

J. ELWELL, *supra*, at 22-23 (footnotes omitted).

[28]6 Kan. at 61-62 (citing Simonds v. Henry, 39 Me. 155 (1855); Howard v. Grover, 28 Me. 97 (1848); Leighton v. Sargent, 27 N.H. 460 (1853)).

[29]For other early cases with a "same locality rule," see Force v. Gregory, 63 Conn. 167, 27 A. 1116 (1893); Smothers v. Hanks, 34 Iowa 286 (1872); Hathorn v. Richmond, 48 Vt. 557 (1876); Gates v. Fleischer, 67 Wis. 504, 30 N.W. 674 (1886).

for rural doctors was lower than the standard for urban doctors, it was assumed that a rural doctor and patient had impliedly agreed to the patently lower standard. The standard of care is no longer patently lower in rural areas.[30] Absent informed consent to inferior medical care, courts can no longer reasonably imply consent to achieve a fair result.

The same locality rule was formulated during a time when application of the standard of ordinary care was still in its incipient stage. This rigid standard was never applied or was soon abandoned in many jurisdictions. Instead, the "similar locality rule" was adopted.[31] The basic flaw in the same locality rule which led to adoption of the similar locality rule was analyzed by the Michigan Supreme Court in *Pelky v. Palmer*:[32]

> We may reasonably take judicial notice that a surgeon's skill depends somewhat upon his experience and opportunity for witnessing operations, and *it is to be expected* that the degrees of surgical skill met with in different localities will be affected by these things. While a man with no skill, or inconsiderable skill, should not shelter himself behind the claim that he was the only practitioner in his neighborhood, and therefore that he was possessed of the ordinary skill required, although shown to possess less than the ordinary skill to be met with in such localities, or, as the books sometimes say, in the general neighborhood, it is true that the character of the locality has an important bearing upon the degree requisite.[33]

Abandonment of the same locality rule is similar to voiding an unconscionable clause in a contract.[34] It would not be good public policy to permit any one professional to set unilaterally the standard to be applied to his practice. *Pelky* makes it clear that the purpose of the locality rule is not to insulate physicians from liability, but to set a

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[30]*See* text accompanying notes 56-57, & 132-35 *infra*.

[31]*See* Whitesell v. Hill, 101 Iowa 629, 70 N.W. 750 (1897); Burk v. Foster, 114 Ky. 20, 69 S.W. 1096 (1902); Pelky v. Palmer, 109 Mich. 561, 67 N.W. 561 (1896); McCracken v. Smathers, 122 N.C. 799, 29 S.E. 354 (1898); McBride v. Huckins, 76 N.H. 206, 81 A. 528 (1911); Mutschman v. Petry, 46 Ohio App. 525, 189 N.E. 658 (1933); Bigney v. Fisher, 26 R.I. 402, 59 A. 72 (1904); RESTATEMENT (SECOND) OF TORTS § 299A (1965).

[32]109 Mich. 561, 67 N.W. 561 (1896). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 164 (4th ed. 1971); McCoid, *supra* note 6, at 570; Meisel, *supra* note 9, at 66 n.41; Waltz, *supra* note 9, at 411; Comment, *Standard of Care for Medical Practitioners—Abandonment of the Locality Rule*, *supra* note 9, at 210.

[33]109 Mich. at 563, 67 N.W. at 561 (emphasis added).

[34]The purpose of the doctrine of unconscionability is to prevent oppression and unfair surprise. *See* U.C.C. § 2-302 (1972); J. CALAMARI & P. PERILLO, THE LAW OF CONTRACTS § 9-40 (2d ed. 1977).

fair test for ordinary skill and care. A specific community is not so unique that similar communities cannot be found and utilized to determine the appropriate standard. Assuming, then, that similar communities can be found, the purpose of the locality rule can be fulfilled: a fair test will be applied to determine ordinary skill and care.[35]

Despite the reasons for the similar locality rule, it has come under increasing attack by the commentators, and some have predicted its eventual demise.[36] Many courts are questioning the locality rule as never before. Consequently, it is nearly impossible to be certain of the rule in some jurisdictions. Lower courts have sometimes moved away from the locality rule before the highest court of the state. The rules announced by a few courts are so vague or inconsistent that one cannot be sure of the test for ordinary skill and care. Finally, in some jurisdictions the courts have not considered the specific issue for quite some time. Nevertheless, several courts appear to hold that locality is only a factor in determining the standard of ordinary skill and care.[37] Most courts, however, appear to apply the similar locality rule,[38] while a few still seem to ap-

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[35]*See* notes 14-16 *supra* and accompanying text. A related problem is the competency of expert witnesses to testify. *See* Annot., 37 A.L.R.3d 420 (1971).

[36]*See* Pearson, *supra* note 6, at 539-40; Waltz, *supra* note 9, at 415. *See generally* Note, *An Evaluation of Changes in the Medical Standard of Care*, 23 VAND. L. REV. 729 (1970).

[37]*See* Priest v. Lindig, 583 P.2d 173 (Alaska 1978); Landeros v. Flood, 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976); Kenney v. Piedmont Hosp., 136 Ga. App. 660, 222 S.E.2d 162 (1975) (construing GA. CODE § 84-924 (1970)); Burrows v. Hawaiian Trust Co., 49 Haw. 351, 417 P.2d 816 (1966); Perin v. Hayne, 210 N.W.2d 609 (Iowa 1973) (citing McGulpin v. Bessmer, 241 Iowa 1119, 43 N.W.2d 121 (1950)); Seaton v. Rosenberg, 573 S.W.2d 333 (Ky. 1978) (citing Blair v. Eblen, 461 S.W.2d 370 (Ky. Ct. App. 1970)); Crosby v. Grandview Nursing Home, 290 A.2d 375 (Me. 1972); Shilkret v. Annapolis Emergency Hosp. Ass'n, 276 Md. 187, 349 A.2d 245 (1975); Brune v. Belinkoff, 354 Mass. 102, 235 N.E.2d 793 (1968); Germann v. Matriss, 55 N.J. 193, 260 A.2d 825 (1970); Faulkner v. Pezeshki, 44 Ohio App. 2d 186, 337 N.E.2d 158 (1975) (quoting Ault v. Hall, 119 Ohio St. 422, 164 N.E. 518 (1928)); Pederson v. Dumouchel, 72 Wash. 2d 73, 431 P.2d 973 (1967); Trogun v. Fruchtman, 58 Wis. 2d 569, 207 N.W.2d 297 (1973).

[38]*See* Harvey v. Kellin, 115 Ariz. 496, 566 P.2d 297 (1977); White v. Mitchell, 568 S.W.2d 216 (Ark. 1978); Murphy v. Dyer, 409 F.2d 747 (10th Cir. 1969) (applying Colorado law); Fitzmaurice v. Flynn, 167 Conn. 609, 356 A.2d 887 (1975); Harris v. Cafritz Mem. Hosp., 364 A.2d 135 (D.C. 1976) (citing Quick v. Thurston, 290 F.2d 360 (D.C. Cir. 1961)); Schwab v. Tolley, 345 So. 2d 747 (Fla. Dist. Ct. App. 1977); Kingston v. McGrath, 232 F.2d 495 (9th Cir. 1956) (applying Idaho law); Borowski v. Van Solbrig, 14 Ill. App. 3d 672, 303 N.E.2d 146 (1973), *aff'd*, 60 Ill. 2d 418, 328 N.E.2d 301 (1975); Joy v. Chau, 377 N.E.2d 670 (Ind. Ct. App. 1978) (citing Worster v. Caylor, 231 Ind. 625, 110 N.E.2d 337 (1953)); Webb v. Lungstrum, 223 Kan. 487, 575 P.2d 22 (1978); Siirila v. Barrios, 398 Mich. 576, 248 N.W.2d 171 (1976); Harris v. Bales, 459 S.W.2d 742 (Mo. Ct. App. 1970); Tallbull v. Whitney, 564 P.2d 162 (Mont. 1977); Kortus v. Jensen, 195 Neb. 261, 237 N.W.2d 845 (1976); Carrigan v. Roman Catholic Bishop, 104 N.H. 73, 178 A.2d 502 (1962); Wiggins v. Piver, 276 N.C. 134, 171 S.E.2d 393 (1970); Benzmiller

ply the same locality rule.[39]

The trend towards abandonment of the locality rule is regrettable. The reasons given for application of a different test for ordinary skill and care are not convincing. The locality rule has been criticized because:

> (1) It may effectively immunize from liability any doctor who happens to be the sole practitioner in his community. . . . (2) The practitioners in a community are able to establish the standard of care which could, perhaps, be an inferior one; (3) A "conspiracy of silence" in the plaintiff's locality could effectively preclude any possibility of obtaining expert medical testimony.[40]

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v. Swanson, 117 N.W.2d 281 (N.D. 1962); Runyon v. Reid, 510 P.2d 943 (Okla. 1973); Eckleberry v. Kaiser Foundation N. Hosps., 226 Or. 616, 359 P.2d 1090 (1961); United States *ex rel.* Fear v. Rundle, 506 F.2d 331 (3d Cir. 1974) (applying Pennsylvania law); Schenck v. Roger Williams Gen. Hosp., 382 A.2d 514 (R.I. 1977); Steeves v. United States, 294 F. Supp. 446 (D.S.C. 1968) (applying South Carolina law); Methodist Hosp. v. Ball, 50 Tenn. App. 460, 362 S.W.2d 475 (1961); Sebree v. United States, 567 F.2d 292 (5th Cir. 1978) (applying Texas law); Swan v. Lamb, 584 P.2d 814 (Utah 1978); Bly v. Rhoads, 216 Va. 645, 222 S.E.2d 783 (1976); Schroeder v. Adkins, 149 W. Va. 400, 141 S.E.2d 352 (1965); Govin v. Hunter, 374 P.2d 421 (Wyo. 1962) (citing Phifer v. Baker, 34 Wyo. 415, 244 P. 637 (1926)).

It is important to note that some define "locality" in a "medical sense" and others define it in a "geographical sense." P. Keeton, *Medical Negligence—The Standard of Care*, 10 TEX. TECH L. REV. 351, 361 (1979). The geographical sense would seem better, for any other definition would lead to unpredictable and unjustifiable results. The locality rule was first defined in a geographical sense, and the reasons for that definition remain.

It is also important to note that some opinions purporting to follow the locality rule have extended the area which they define as "same or similar." *See, e.g.*, Gist v. French, 136 Cal. App. 2d 247, 271, 288 P.2d 1003, 1018 (1955) ("'[C]ommunity' means . . . such an area as is governed by the same laws, and the people are unified by the same sovereignty and customs."); Fitzmaurice v. Flynn, 167 Conn. 609, 617, 356 A.2d 887, 892 (1975) (the state of Connecticut); Flock v. J.C. Palumbo Fruit Co., 63 Idaho 220, 238, 118 P.2d 707, 715 (1941) ("centers readily accessible"); Tvedt v. Haugen, 70 N.D. 338, 349, 294 N.W. 183, 188 (1940) (points easily accessible). These holdings are actually a back-door method of abandoning the locality rule, although they are still more fair to the physician than a national standard.

[39]*See* Parrish v. Spink, 284 Ala. 263, 224 So. 2d 621 (1969); Loftus v. Hayden, 379 A.2d 1136 (Del. Super. Ct. 1977); Ardoin v. Hartford Accident & Indem. Co., 360 So. 2d 1331 (La. 1978) (construing LA. REV. STAT. ANN. § 9:2794 (West Supp. 1979)); Hill v. Stewart, 209 So. 2d 809 (Miss. 1968); Lockart v. Maclean, 77 Nev. 210, 361 P.2d 670 (1961); Gandara v. Wilson, 85 N.M. 161, 509 P.2d 1356 (1973); Spadaccini v. Dolan, 63 App. Div. 2d 110, 407 N.Y.S.2d 840 (1978); Hansen v. Isaak, 70 S.D. 529, 19 N.W.2d 521 (1945); Pepin v. Averill, 113 Vt. 212, 32 A.2d 665 (1943).

[40]Ardoin v. Hartford Accident & Indem. Co., 360 So. 2d 1331, 1337 (La. 1978) (citations omitted). *See also* Comment, *Standard of Care for Medical Practitioners—Abandonment of the Locality Rule*, *supra* note 9, at 210.

The first criticism is clearly not true if the similar locality rule is applied. The third criticism is also unjustified. It is difficult to believe that physicians in all similar communities would conspire in refusing to testify. Of the three, the second criticism is the most legitimate, although it too is insufficient. Conceivably, similar communities could all rely on the locality rule and establish a lower standard of care, but a conspiracy of this type is extremely improbable. The more reasonable assumption is that physicians in similar communities will independently establish the best standard they are capable of producing.

Another criticism of the locality rule is that the purpose for the rule is no longer present. It will be recalled that the purpose of the locality rule was to provide a fair test for the ordinary standard of care. A test based on a similar locality was fair because the ability of a physician appeared to vary with the type of community, resulting in implied consent to the standard of care available.[41] The position that the purpose of the rule is no longer present is well stated in *Ardoin v. Hartford Accident & Indemnity Co.*:[42]

> Indeed, whatever may have justified a locality rule for physicians fifty or a hundred years ago cannot be reconciled with the actualities of medical practice today. The quality of medical training has improved dramatically. With modern transportation and communication systems, new techniques and discoveries are available to all doctors within a short period of time through seminars, medical journals, closed circuit television presentations, special radio networks for doctors, tape recorded digests of medical literature, and current correspondence courses.[43]

Statements similar to that in *Ardoin* are increasinlgy frequent.[44] While the observation in *Ardoin*—that medical training and the ability to remain current in the field have improved—is accurate, it

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[41]*See* notes 19-25 *supra* and accompanying text.

[42]360 So. 2d 1331 (La. 1978).

[43]*Id.* at 1337 (citing Shilkret v. Annapolis Emergency Hosp. Ass'n, 276 Md. 187, 349 A.2d 245 (1975); Bruni v. Tatsumi, 46 Ohio St. 2d 127, 346 N.E.2d 673 (1976); Waltz, *supra* note 9; 25 ARK. L. REV. 169 (1971); Comment, *The Locality Rule in Medical Malpractice Suits*, 5 CALIF. W.L. REV. 124 (1968); 38 OHIO ST. L.J. 203 (1977); Comment, *Standard of Care for Medical Specialists*, 16 ST. LOUIS UNIV. L.J. 497 (1972); Comment, *Standard of Care for Medical Practitioners—The Locality Rule*, 14 S. S.D.L. REV. 349 (1969); Comment, *Recent Developments—Medical Specialists and the Locality Rule*, 14 STAN. L. REV. 884 (1962); Note, *An Evaluation of Changes in the Medical Standard of Care*, *supra* note 36).

[44]One commentator stated: "There is no longer any reason why a small-town physician cannot practice at the level of competence of his urban counterpart." A. HOLDER, MEDICAL MALPRACTICE LAW 59 (2d ed. 1978).

is an incomplete analysis of whether a need for the locality rule exists in society today. It will be recalled that the court in *Tefft* noted that the standard of care could vary because of the differences in communities alone. The argument in *Ardoin* only approaches the question of whether rural physicians still suffer from the inability to remain current in their field. Obviously, the quality of medical training and the ability to remain current in the field have improved; however, the locality rule is concerned with whether skill and care differ between one type of community and the next and is not concerned with whether the overall quality of medical care has improved. *Ardoin* justifiably points out that rural physicians now have greater opportunities to remain current in their field, thereby reducing the disparity in experience and training between rural and urban physicians. Even so, *Ardoin* and other cases have failed to recognize that the quality of physicians in rural and urban areas may be affected by circumstances beyond the physicians' control.

A recent article by Dr. William Kane in *The Journal of the American Medical Association*[45] surveys the problems and disadvantages which rural physicians must face. Contrary to what recent opinions appear to assume in dealing with the locality rule, Dr. Kane states: "The quality of medical services provided in rural areas is difficult to assess. We know little about the quality of care provided by physicians regardless of where they practice."[46] Perhaps, then, the courts should slow the current race to abandon the locality rule, a race precipitated by the assumption that no justifiable reason exists for a lower standard of care in rural communities. Although little is known about the quality of medical services in any area, it is clear that "[r]ural people have far fewer health care workers available to them than do people in urban areas."[47] In fact,

> [t]he most crucial and basic problem of rural health care is the distribution and availability of physicians, dentists, and other health workers in rural areas. The availability of such professionals directly affects the type of rural health facilities, the quality of care provided, the availability of preventive health services, and the nature of practice in rural areas. The problems in this area are certainly not new.[48]

Dr. Kane advances several reasons for the relatively lower number of physicians in rural areas: Loss of an informal atmosphere for

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[45]Kane, *Rural Health Care*, 240 J.A.M.A. 2647 (1978).
[46]*Id.* at 2648.
[47]*Id.* at 2647.
[48]*Id.* at 2649.

discussion with fellow physicians; limited availability of group practice; and lower economic reasons to support his "expectations for income, family and leisure time, professional contact with peers, and continuing education."[49] A lack of adequate health insurance, public or private, may account for part of the difference in financial resources between rural and urban areas.[50] The future promises no respite for rural areas:

> [T]he statistics point to a need for concern, especially when the number of incoming physicians may not be keeping pace with the physicians leaving rural areas and where the physicians in rural areas are an older age group, further removed from formal training than their more urban counterparts.[51]

Any attempt to impose a higher standard upon physicians who are responding to conditions beyond their control may exacerbate an already serious problem. An increase in the overall liability of rural physicians might further lower the standard of care—presumably the opposite effect intended by abandoning the locality rule.

Even assuming that the statement in *Ardoin* is true, what is to be gained by relaxing the rule? One author opined: "The doctors will continue to set by customary practice the standard by which they are to be judged, but any increase in geographical boundaries will improve the overall level of practice."[52] This argument appears to assume that, in fact, the standard of care varies from one area to the next. If so, then the reason for the locality rule is still present. If the goal is improvement of the overall level of practice in the United States,[53] it hardly makes sense to accomplish this goal by increasing the liability of physicians in areas where they are performing as best they can, given the circumstances.

On the other hand, what is to be lost if the similar locality rule is abandoned? If, in fact, the standard of care varies from similar types of communities to different types of communities, physicians will be judged unfairly. A physician from a metropolitan area would set the standard of care that is required in many smaller communities, even though these communities are presumably receiving the best care that the physicians are capable of providing. If there is no difference in the standard of care between large and small com-

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[49]*Id.*

[50]*Id.* at 2648.

[51]*Id.*

[52]Note, *An Evaluation of Changes in the Medical Standard of Care*, *supra* note 36, at 741.

[53]Waltz, *supra* note 9, at 420, stated: "The fall of the locality rule will exert pressure for uniformly adequate health services, a goal to which both law and medicine are surely united."

munities, and if a similar locality rule is applied, the resulting standard by which the physician is judged would be the same under a similar locality rule as under a national standard.

In summary, there is probably much to be lost and little to be gained by adopting a national or state standard. Those who favor abandonment of the similar locality rule have lost sight of the reason for the rule and how it developed. Reasonable skill and care were implied from the undertaking to treat the patient. For various reasons,[54] ordinary skill and care were determinative of reasonable skill and care. This degree of skill and care was the standard to which the patient presumably consented, and which could be altered by consent. The test for ordinary skill and care developed to be that which was available in similar communities, for the standard varied because of differing circumstances between large and small communities. To abandon the locality rule when the need for it remains, when the benefits of abandonment are few and the risks great, would be a serious error.

Although the locality rule is justified today, implied consent to the locality rule is no longer justified. Judges reasonably implied consent to the locality rule in years past, but conditions at the time warranted the implication:

> As recently as the turn of the century, a patient had less than an even chance of benefiting from an encounter with a physician. Physicians were just beginning to emerge from the era when they were essentially tradesmen, often with little more to offer their patients than comfort and company during illness and death. The principal causes of mortality were the infectious diseases against which the medical community stood impotent. There were few medical schools, few diagnostic tests, no specific treatment of disease, and no specialization of physicians.[55]

Today, conditions have changed dramatically, resulting in increased expectations by the patient:

> During the past century, however, medical progress has brought about a radical change in the doctor's ability to diagnose and treat disease. Infectious disease has all but been conquered—such chronic diseases as heart disease have become the major killers. Hospitals have replaced "pest houses," and medical education has become increasingly demanding and exact. As technology has increased the doc-

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[54]*See* note 7 *supra* and accompanying text.

[55]G. Annas & J. Healey, Jr., *The Patient Rights Advocate: Redefining the Doctor-Patient Relationship in the Hospital Context*, 27 VAND. L. REV. 243, 251 (1974) (citations omitted).

> tor's ability to deal effectively with more health-threatening situations, it has also widened the gulf between doctor and patient. More problems can be diagnosed and treated, the doctor's time is more in demand, and he has less time to spend with his patient to develop a working relationship of trust and mutual respect. As medical advances become more subtle and complex, explaining diagnoses, procedures, treatments, and alternatives to the patient becomes more difficult. Concurrently, widespread publicity—especially through television and newspaper coverage of medical breakthroughs and portrayal of medical crisis resolutions in fiction—generates greater public expectations. Though some way must be found to restore the expectations of the medical consumer to reality, there is a sense in which such expectations represent the inadequacies of the present doctor-patient and hospital-patient relationships. The doctor's position has been strengthened and the patient's weakened by technological advances; it is no longer beneficial to the patient to maintain the doctor-patient relationship of 140 or even 40 years ago. Too much has changed.[56]

In addition to changes in technology and the ability to diagnose ailments, concomitant changes occurred in the system of educating physicians:

> The "locality rule" (never recognized in England) had its origin in the very old and far away days when there were many little institutions which called themselves medical schools. Students were admitted who could show a high school diploma or furnish a certificate from a school principal that the bearer had completed the "equivalent" of a high school course of study. At the end of the course, he was given an M.D. degree. Passing the licensing board was in the nature of a formality. In many rural communities, ever thereafter the doctor was on his own. Frequent refresher courses, now generally attended, were unknown. . . .
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> Now medical schools admit only college graduates. They are equipped to the highest point of efficiency and turn out doctors who must continue their studies by internships and by actual experience under expert supervision. They continue to study, continue to attend refresher courses, and have access to journals which afford them opportunity to keep them current in the latest treatments and procedures.[57]

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[56] *Id.* at 251-52 (citations omitted).

[57] Wiggins v. Piver, 276 N.C. 134, 139, 171 S.E.2d 393, 396 (1970).

In light of the consumer's increased expectations of medical treatment in all geographic areas and the radical change in the overall education of physicians, implied consent to the locality rule can no longer be justified. The locality rule should only be applied when the patient has given informed consent to the standard of care required by the locality rule.

B. Development in Indiana

No courts have been more consistent in applying the similar locality rule than those of Indiana. Development of the rule was similar to that in other states. From the early 1800's to about 1860, there were very few reported malpractice cases. The early rule first appeared in *Long v. Morrison.*[58] In that case the Indiana Supreme Court held that the physician "was liable for damages arising as well from the want, as from want of application, of skill."[59] The only Indiana case cited as support for this rule was *Connor v. Winton.*[60] In *Connor*, suit was brought against a veterinarian for negligent treatment of a horse. This case should stand for the proposition that the foundation for medical malpractice is the implied contract which results from the undertaking. The court stated: "When an act is done *gratis*, it is called in the books a mandate . . . . The degree of diligence required of the mandatory is equally well settled. He is bound only to slight diligence, and responsible only for gross neglect."[61] However, "[t]he general rule in relation to bailment is, that where the contract is of mutual benefit, as where the work is done for hire, there, ordinary diligence only is required."[62]

The court in *Long* interpreted *Connor* to mean that physicians and veterinarians would be held to a standard of skill and care which was implied from the undertaking. The standard of care would depend, under the holding of *Connor*, upon whether the treatment was done for payment or for free.[63] Even so, it was also said in *Connor* that "[w]hat would be simply negligent as to one thing, would be gross negligence as to another,"[64] thus requiring greater care in treating a valuable horse than a less valuable one. The court in *Long* apparently felt that a person was, of course, a very valuable "thing." Therefore, the court made no distinction between an under-

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[58]14 Ind. 595 (1860).

[59]*Id.* at 600.

[60]8 Ind. 315 (1856).

[61]*Id.* at 318.

[62]*Id.*

[63]It was decided very early in this state, unlike the common law of England, that a physician in Indiana could bring suit for fees owed to him. Judah v. M'Namce, 3 Blackf. 269 (Ind. 1833).

[64]8 Ind. at 319.

taking for hire and an undertaking for free, even though it did not expressly consider the question. This question was raised peripherally in *Peck v. Martin*,[65] a medical malpractice action in which lack of consideration was raised as a defense. The court stated: "The *duty* arising from such character and undertaking, to exercise a reasonable degree of care and skill is as apparent as if it were stated in terms."[66] One could read the case narrowly, for it was only decided that a duty arose regardless of payment. No express distinction was made, however, between the standard applied with payment and the standard without payment.

Indiana first adopted the similar locality rule as the test for the standard of skill and care in *Gramm v. Boener*:[67]

> It seems to us, that physicians or surgeons, practising in small towns, or rural or sparsely populated districts, are bound to possess and exercise at least the average degree of skill possessed and exercised by the profession in such localities generally. It will not do, as we think, to say, that if a surgeon or physician has exercised such a degree of skill as is ordinarily exercised in the particular locality in which he practises, it will be sufficient.
>
> There might be but few practising in the given locality, all of whom might be quacks, ignorant pretenders to knowledge not possessed by them, and it would not do to say, that, because one possessed and exercised as much skill as the others, he could not be chargeable with the want of reasonable skill.[68]

Thus, the Indiana Supreme Court refused to adopt the *Tefft v. Wilcox*[69] standard that the proper test is determined by the same locality rule. The Indiana courts have repeatedly affirmed the ap-

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[65]17 Ind. 115 (1861).

[66]*Id.* at 117.

[67]56 Ind. 497 (1877).

[68]*Id.* at 501. As support, the court quoted from T. SHEARMAN & A. REDFIELD, LAW OF NEGLIGENCE § 436 (1869):

> The standard of skill may vary according to circumstances, and may be different even in the same state or country. In country towns, and in unsettled portions of the country remote from cities, physicians, though well informed in theory, are but seldom called upon to perform difficult operations in surgery, and do not enjoy the greater opportunities of daily observation and practice which large cities afford. It would be unreasonable to exact from one in such circumstances that high degree of skill which an extensive and constant practice in hospitals or large cities would *imply* a physician to be possessed of.

56 Ind. at 500-01 (emphasis added).

[69]6 Kan. 46 (1870). *See also* notes 26-34 *supra* and accompanying text.

plication of the similar locality rule in medical malpractice cases[70] and have even used the rule to set the standard of care for specialists.[71] In *Worster v. Caylor*,[72] the Indiana Supreme Court restated that the basis for the implied standard of care, as determined by the locality rule, is in contract:

> In the absence of a special contract, the physician or surgeon who assumes to treat and care for a patient impliedly contracts that he has the reasonable and ordinary qualifications of his profession and that he will exercise reasonable skill, diligence and care in treating the patient. . . .
>
> The degree of skill and care required of the physician or surgeon who is employed because he is a specialist, is that degree of skill and knowledge which is ordinarily possessed by physicians and surgeons who devote special attention to the ailment, its diagnosis and treatment, agreeable with the state of scientific knowledge at the time of the operation or treatment, in similar localities generally.[73]

Thus, the development of the locality rule in Indiana has, generally, paralleled the development of the rule in other states. The Indiana courts, like the courts in most other states, have continued to perceive the logic and fairness inherent in the locality rule. The similar locality rule however, may, have been altered or abolished in Indiana by statute.[74] The statute, which makes an opinion by a medical review panel a prerequisite to appeal, provides in

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[70]*See* Worster v. Caylor, 231 Ind. 625, 110 N.E.2d 337 (1953); Kelsey v. Hay, 84 Ind. 189 (1882); Joy v. Chau, 377 N.E.2d 670 (Ind. Ct. App. 1978) (although noting that the locality rule has been under increasing attack, the court concluded that any changes in the rule must come from the Indiana Supreme Court); Bassett v. Glock, 368 N.E.2d 18 (Ind. Ct. App. 1977); Adkins v. Ropp, 105 Ind. App. 331, 14 N.E.2d 727 (1938); Adolay v. Miller, 60 Ind. App. 656, 111 N.E. 313 (1916); Longfellow v. Vernon, 57 Ind. App. 611, 105 N.E. 178 (1914); Thomas v. Dabblemont, 31 Ind. App. 146, 67 N.E. 463 (1903); Baker v. Hancock, 29 Ind. App. 456, 63 N.E. 323 (1902); Smith v. Stump, 12 Ind. App. 359, 40 N.E. 279 (1895); Becknell v. Hosier, 10 Ind. App. 5, 37 N.E. 580 (1894).

In some opinions the standard which the Indiana courts applied was very general, leaving doubt whether the courts applied the similar locality rule. *See* Edwards v. Uland, 193 Ind. 376, 140 N.E. 546 (1923); Robinson v. Ferguson, 107 Ind. App. 107, 22 N.E.2d 901 (1939); McCoy v. Buck, 87 Ind. App. 433, 157 N.E. 466 (1927). These cases can, however, be read consistently with other cases which expressly apply the similar locality rule.

[71]*See* Joy v. Chau, 377 N.E.2d 670 (Ind. Ct. App. 1978). Many states no longer apply the locality rule to specialists. See cases cited in Ardoin v. Hartford Accident & Indem. Co., 360 So. 2d 1331, 1337 (La. 1978).

[72]231 Ind. 625, 110 N.E.2d 337 (1953).

[73]*Id.* at 629-30, 110 N.E.2d at 339 (citations omitted).

[74]*See* IND. CODE §§ 16-9.5-9-1 to 10 (1976 & Supp. 1978). For a discussion of the statute, see *The 1975 Medical Malpractice Act*, 51 IND. L.J. 91 (1975).

pertinent part: "All health care providers in this state, whether in the teaching profession or otherwise, who hold a license to practice in their profession, shall be available for selection as members of the medical review panel."[75] The statute also provides in pertinent part: "Any report of the expert opinion reached by the medical review panel *shall be admissible* as evidence in any action subsequently brought by the claimant in a court of law, but such expert opinion shall not be conclusive . . . ."[76]

Since members of the panel, by statute, may be from any area, and since there is no requirement that they know the standard of care and skill in the area in which the defendant physician practices, the statute does not appear to include the similar locality rule. The statute places the courts in an awkward position. One can only wonder what value the panel's report would be to the court if the similar locality rule is retained. It seems that, if the locality rule is followed, the report might be admissible, but irrelevant because it would not be material.

What, then, is the legislature attempting to accomplish? Does it intend to abrogate the similar locality rule by statute? If so, such a result would be regrettable. The Indiana courts, to date, have not considered the question.

A more reasonable interpretation of the statute would be that members of the panel must be selected consistently with the locality rule. In *Seymour National Bank v. State*,[77] the court stated: "[S]tatutes in derogation of the common law will be strictly construed; therefore, in case of doubt, we will favor a construction which is in harmony with the common law."[78] Because the statute does not expressly require members of the panel to be from both urban and rural areas, and because the statute does not mention the locality rule, the panel's report should be inadmissible if the members of the panel are not chosen in conformity with the locality rule. The party offering the panel's report as evidence in the case should have the burden of showing that the report was based on the standard of care in similar localities.

Changes in medical services in Indiana have also paralleled the changes in other states. Consequently, informed consent to the locality rule should be required before a patient can be said to have agreed to the standard of care in a similar locality.

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[75]IND. CODE § 16-9.5-9-3(b)(1) (Supp. 1978). The constitutionality of the requirement of submitting claims to the review panel has been upheld. *See* Hines v. Elkhart Gen. Hosp., 465 F. Supp. 421, 433 (N.D. Ind. 1979).

[76]IND. CODE § 16-9.5-9-9 (1976) (emphasis added).

[77]384 N.E.2d 1177 (Ind. Ct. App. 1979).

[78]*Id.* at 1186.

III. Consent—Informed and Otherwise

A. The Requirement of Consent

An individual's control over his bodily integrity would appear to be a basic right in a free society. In the context of medical treatment which is not mandated by some public necessity,[79] English courts have long recognized that a physician's authority to treat his patient must be founded upon consent.[80] As early as 1767, the court in *Slater v. Baker*[81] noted: "[I]t is reasonable that a patient should be told what is about to be done to him, that he may take courage and put himself in such a situation as to undergo the operation."[82] More than one hundred years after *Slater*,[83] American courts also held that consent was a necessary ingredient of the physician-patient relationship, but did not base their decision on English precedent.[84] In *Rolater v. Strain*,[85] the Oklahoma Supreme Court quoted with approval a statement of the basic principle underlying the need for consent before a physician may treat a patient:

> "Under a free government at least, the free citizen's first and greatest right which underlies all others—the right to the inviolability of his person, in other words, his right to himself—is the subject of universal acquiescence, and this right necessarily forbids a physician or surgeon, however

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[79]*See generally* Dunham v. Wright, 423 F.2d 940 (3d Cir. 1970) (emergency treatment); *In re* President and Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1964) (blood transfusion); Koury v. Follo, 272 N.C. 366, 158 S.E.2d 548 (1968) (emergency treatment); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976) (state's interest in preserving life); Gravis v. Physicians & Surgeons Hosp., 415 S.W.2d 674 (Tex. Civ. App. 1967) (emergency treatment). *See also* Riga, *Compulsory Medical Treatment of Adults*, 22 Cath. Law. 105 (1976).

[80]*See* Slater v. Baker, 95 Eng. Rep. 860 (K.B. 1767).

[81]95 Eng. Rep. 860 (K.B. 1767).

[82]*Id.* at 862. The court also found that obtaining consent was the "usage and law of surgeons." *Id.*

[83]*Slater* is, in some respects, a very modern case. The defendants, Baker and Stapleton, were employed by Slater to cure his broken leg. Therefore, it was clear that he consented to treatment. Baker, however, used an unusual, if not unknown, method in treating the leg. In the words of the court, "[i]t seems as if Mr. Baker wanted to try an experiment with this new instrument." *Id.* Liability on the part of the defendants was predicated on a lack of consent by Slater to the unusual operation. The defendants also raised the objection that the action was improperly brought as a special action upon the case, when it was properly one of trespass. Although legally correct, the defense was rejected. Compensation of victims of medical malpractice without strict adherence to procedural requirements is not a modern development.

[84]*See* Pratt v. Davis, 224 Ill. 300, 79 N.E. 562 (1906); Theodore v. Ellis, 141 La. 709, 75 So. 655 (1917); State v. Housekeeper, 70 Md. 162, 16 A. 382 (1889); Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905); Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 105 N.E. 92 (1914); Hunter v. Burroughs, 123 Va. 113, 96 S.E. 360 (1918).

[85]39 Okla. 572, 137 P. 96 (1913).

> skillful or eminent, who has been asked to examine, diagnose, advise and prescribe (which are at least necessary first steps in treatment and care), to violate without permission the bodily integrity of his patient by a major or capital operation, placing him under an anaesthetic for that purpose, and operating on him without his consent or knowledge."[86]

Soon after World War I, cases alleging unauthorized treatment began to occur more frequently.[87] Even where no adverse effect could be proved, recovery was permitted if the physician went beyond the consent obtained.[88] At first, American courts were willing to find valid consent even though little information concerning the treatment was provided to the patient.[89] Liability was found only when no consent had been obtained or when defendant's actions had clearly gone beyond the consent given.[90] Liability on this basis has been permitted where the patient consented to an exploratory operation and a mastectomy was performed;[91] where the patient consented to an operation with no greater risk than an electromyogram and a far more dangerous procedure was carried out;[92] and where the patient consented to an appendectomy and her fallopian tubes were removed.[93] Courts also found consent lacking when fraudulent or misleading information was provided to the patient in order to obtain his consent.[94]

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[86]*Id.* at 575, 137 P. at 97 (quoting 37 CHICAGO LEGAL NEWS 213 (1905) (discussing Pratt v. Davis, 118 Ill. App. 166 (1905)). In 1914 Justice Cardozo wrote: "Every human being of adult years and sound mind has the right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages." Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914).

[87]*See* Note, *Consent as a Prerequisite to a Surgical Operation*, 14 U. CIN. L. REV. 161 (1940).

[88]*See* Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905) (patient consented to operation on right ear; physician operated on left ear); Corn v. French, 71 Nev. 280, 289 P.2d 173 (1955) (patient consented to exploratory surgery and doctor performed a mastectomy); Rolater v. Strain, 39 Okla. 572, 137 P. 96 (1913) (patient consented to operation on express agreement no bone was to be removed; physician removed sesamoid bone).

[89]*See generally* Meisel, *supra* note 9, at 77-81.

[90]*See, e.g.*, Meek v. City of Loveland, 85 Colo. 346, 276 P. 30 (1929); Zoterell v. Rapp, 187 Mich. 319, 153 N.W. 692 (1915); Corn v. French, 71 Nev. 280, 289 P.2d 173 (1955).

[91]Corn v. French, 71 Nev. 280, 289 P.2d 173 (1955).

[92]Berkey v. Anderson, 1 Cal. App. 3d 790, 82 Cal. Rptr. 67 (1969).

[93]Tabor v. Scobee, 254 S.W.2d 474 (Ky. 1952).

[94]"They could not, of course, compel her to submit to an operation, but if she voluntarily submitted to its performance, her consent will be presumed, *unless she was the victim of a false and fraudulent misrepresentation* . . . ." State v. Housekeeper, 70 Md. 162, 170, 16 A. 382, 384 (1889) (emphasis added). *See* Wall v. Brim, 138 F.2d 478, 479 n.7 (5th Cir. 1943); Waynick v. Reardon, 236 N.C. 116, 72 S.E.2d 4 (1952). *But see* Hunt v. Bradshaw, 242 N.C. 517, 88 S.E.2d 762 (1955).

During the 1950's, courts began to require not only that physicians obtain consent, but also that the consent be an informed one. That is to say, a physician's duty to obtain consent without affirmatively misleading a patient was metamorphosed into an affirmative duty to give information which would allow the patient to decide whether or not the cure was worth the risk.[95]

B. Informed Consent

As is the rule with other legal doctrines, the term informed consent is deceptively simple and has a meaning which changes from jurisdiction to jurisdiction.[96] Courts have disagreed over the treatment of two basic issues: (1) What cause of action is created if informed consent has not been obtained, and (2) what standard is used to determine whether the patient has been adequately informed?

Courts are divided on the question of whether a patient's cause of action for lack of informed consent is based on negligence or battery. In early cases, courts failed to distinguish between consent that was lacking or obtained by misrepresentation, and less than fully informed consent.[97] In each case, the courts found the proper claim

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[95]Slater v. Baker, 95 Eng. Rep. 860 (K.B. 1767), contained the seeds which could have grown into a requirement of informed consent. However, one of the first American decisions to speak of an affirmative duty on the part of a physician to inform his client of the risk involved in treatment was not rendered until 1955. In Hunt v. Bradshaw, 242 N.C. 517, 523, 88 S.E.2d 762, 766 (1955), the court stated: "Failure to explain the risks involved, therefore, may be considered a mistake on the part of the surgeon, but under the facts cannot be deemed such want of ordinary care as to import liability." That dictum was relied upon by the California appellate court in Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 317 P.2d 170 (1957), in creating an affirmative duty of disclosure to permit informed consent by the patient.

[96]There is a large body of legal literature on the law of consent. *See, e.g.*, Meisel, *supra* note 9; Riskin, *Informed Consent: Looking for the Action*, 1975 U. ILL. L.F. 580; Waltz & Scheuneman, *Informed Consent to Therapy*, 64 NW. U.L. REV. 628 (1970); Note, *Who's Afraid of Informed Consent? An Affirmative Approach to the Medical Malpractice Crisis*, 44 BROOKLYN L. REV. 241 (1978); Note, *Informed Consent Liability*, 26 DRAKE L. REV. 696 (1977); Note, *The Evolution of the Doctrine of Informed Consent*, 12 GA. L. REV. 581 (1978).

[97]Pratt v. Davis, 224 Ill. 300, 79 N.E. 562 (1906) (battery for removal of uterus without knowledge or consent of patient); Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905) (battery for operation on left ear when consent obtained only for operation on right ear); Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 105 N.E. 92 (1914) (battery where patient consented to examination but not to operation to remove tumor); Rolater v. Strain, 39 Okla. 572, 137 P. 96 (1913) (battery for removing bone during operation when consent given only if no bone to be removed); Slater v. Baker, 95 Eng. Rep. 860 (K.B. 1767) (patient not informed of unusual method used to treat broken leg; trespass the proper cause of action).

to be one of battery.[98] In *Natanson v. Kline*,[99] the supreme court of Kansas became the first court to hold that a physician's liability for failing to inform a patient of the risks and alternatives to proposed medical treatment should be based on negligence, not on battery.[100] Unauthorized treatment was distinguished from conventional assault and battery on the theory that the physician acts in good faith with the intent of helping his patient, unlike the battery tortfeasor who usually acts out of malice with no intent of aiding his victim,[101] a distinction which had been rejected by the supreme court of Minnesota in 1905.[102] Although some jurisdictions after *Natanson* have continued to apply the law of battery to situations where informed consent is lacking,[103] the trend has been to apply the law of negligence.[104]

Significant consequences arise from favoring negligence over battery as the underlying cause of action. A physician may be held liable without proof of actual damages under a battery theory.[105] In addition, battery and negligence cases may be subject to different

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[98]Gray v. Grunnagle, 423 Pa. 144, 223 A.2d 663 (1966) (failure to warn a patient of an inherent risk of permanent paralysis held to be a battery); Belcher v. Carter, 13 Ohio App. 2d 113, 234 N.E.2d 311 (1967) (battery for failure to warn of radiation burns); Nolan v. Kechijian, 75 R.I. 165, 64 A.2d 866 (1949) (trespass to the body and negligence for operation to strengthen ligaments of spleen and spleen removed); Wall v. Brim, 138 F.2d 478 (5th Cir. 1943) (operation for removal of a cyst located on the neck without full disclosure of the risks held a "technical battery").

[99]186 Kan. 393, 350 P.2d 1093, *clarified on rehearing*, 187 Kan. 186, 354 P.2d 670 (1960) (radiation treatment produced a severe burn; on first hearing court held cause of action proper in either battery or negligence; on rehearing, negligence and not battery held to be proper cause of action).

[100]*Id.* at 401-02, 350 P.2d at 1100.

[101]The court stated: "What appears to distinguish the case of the unauthorized surgery or treatment from traditional assault and battery cases is the fact that in almost all of the cases the physician is acting in relatively good faith for the benefit of the patient." *Id.*

[102]In Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905), the defendant contended that assault and battery would not lie because of the "entire absence of any evidence tending to show an evil intent." *Id.* at 270, 104 N.W. at 15. The defendant's position was that, absent evidence he was motivated by wrongful intent or guilty of negligence, there was no assault and battery. The court disagreed with his theory of medical liability: "If the operation was performed without plaintiff's consent, and the circumstances were not such as to justify its performance without, it was wrongful; and, if it was wrongful, it was unlawful." *Id.* at 271, 104 N.W. at 16.

[103]*See, e.g.*, Belcher v. Carter, 13 Ohio App. 2d 113, 234 N.E.2d 311 (1967); Gray v. Grunnagle, 423 Pa. 144, 223 A.2d 663 (1966).

[104]*See* Di Filippo v. Preston, 53 Del. 539, 173 A.2d 333 (1961); Aiken v. Clary, 396 S.W.2d 668 (Mo. 1965); Kaplan v. Haines, 93 N.J. Super. 242, 232 A.2d 840, *aff'd*, 51 N.J. 404, 241 A.2d 235 (1968); Trogun v. Fruchtman, 58 Wis. 2d 569, 207 N.W.2d 297 (1973). *See also* Comment, *New Trends in Informed Consent?*, 54 NEB. L. REV. 66 (1975).

[105]W. PROSSER, *supra* note 32, § 9.

statutes of limitations.[106] Under the Federal Tort Claims Act,[107] a suit for medical malpractice may be rejected if based on battery.[108] One issue raised by bringing a cause of action in negligence for lack of informed consent is the standard of disclosure. While expert opinion may not be necessary to prove a battery, medical negligence actions have generally required expert testimony to set the standard of care.[109]

When the duty to inform was first developing, a physician or surgeon was called upon to inform his patient in only the most general terms concerning the planned course of treatment.[110] Courts did not require an extensive description of the risks and found liability only where no actual consent had been given,[111] or where the risk had been a certainty.[112] With the development of informed consent, courts had to find an appropriate standard for determining the scope of disclosure necessary for effective consent. After *Natanson*, which rejected battery as the underlying tort in cases alleging lack of informed consent, a majority of jurisdictions adopted the general medical negligence standard of medical custom for determining the extent of required disclosure.[113] Medical custom, for purposes

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[106]*See, e.g.*, Hershey v. Peake, 115 Kan. 562, 223 P. 1113 (1924).

[107]28 U.S.C. §§ 2671-2680 (1970).

[108]Under the Act the United States may be sued for the negligence of its employees, but not for their assault and battery. *Id.* § 2680(h). *Compare* Moos v. United States, 118 F. Supp. 275 (D. Minn. 1954) *with* Lane v. United States, 225 F. Supp. 850 (E.D. Va. 1964).

[109]*See, e.g.*, Karp v. Cooley, 493 F.2d 408, 420 (5th Cir.), *cert. denied*, 419 U.S. 845 (1974):

> The Texas standard against which a physician's disclosure or lack of disclosure is tested is a medical one which must be proved by expert medical evidence of what a reasonable practitioner of the same school of practice and the same or similar locality would have advised a patient under similar circumstances.

[110]*See* O'Brien v. Cunard S.S. Co., 154 Mass. 272, 28 N.E. 266 (1891) (consent implied from voluntarily submitting to a vaccination); McGuire v. Rix, 118 Neb. 434, 225 N.W. 120 (1929); Hunt v. Bradshaw, 242 N.C. 517, 88 S.E.2d 762 (1955) (failure to explain a risk of loss of use of arm). *See also* Meisel, *supra* note 9, at 79:

> What long passed for a valid consent to treatment was a simple interchange between patient and physician. In substance the physician said to the patient, "You need thus-and-so to get better," and the patient responded with some phrase or action indicating whether or not he intended to go along with the doctor's recommendations.

[111]Berkey v. Anderson, 1 Cal. App. 3d 790, 82 Cal. Rptr. 67 (1969); Zoterell v. Repp, 187 Mich. 319, 153 N.W. 692 (1915); Corn v. French, 71 Nev. 280, 289 P.2d 173 (1955).

[112]Bang v. Charles T. Miller Hosp., 251 Minn. 412, 88 N.W.2d 186 (1958) (plaintiff consented to a prostate operation, but was not informed it would necessarily involve the cutting of his spermatic cords).

[113]*See, e.g.*, Karp v. Cooley, 493 F.2d 408 (5th Cir. 1974); Carmichael v. Reitz, 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971); Dunlap v. Marine, 242 Cal. App. 2d 162, 51

of consent, requires a physician to inform his patient of those risks which a reasonable medical practitioner would have disclosed.[114] In jurisdictions adhering to the locality rule, disclosure under the medical custom standard depends upon what a physician in the same or similar locality would disclose.[115] A plaintiff has the burden of establishing the medical custom by use of expert testimony, which is not always readily available.

An exercise of medical judgment usually plays no part in a physician's determination of risks that should be disclosed to a patient. Limiting an individual's information, while calling upon him to make the ultimate decision concerning medical treatment, characterized as consent, serves no valid medical or legal policy. The illogic of requiring informed consent, but permitting the consent to be limited in reality by medical custom was first rejected by the New Mexico Supreme Court in *Woods v. Brumlop.*[116] However, the pivotal decision on this issue was *Canterbury v. Spence.*[117] Canterbury, a youth of nineteen years, suffered from back pain. He consulted Dr. Spence and submitted to an operation that was described by the doctor as, not more serious "than any other operation."[118] Canterbury recuperated normally until he suffered a fall from his hospital bed which resulted in an immediate setback. At the time of the trial, he suffered from urinary incontinence, paralysis of the bowels, and required crutches to walk. His suit for legal recovery—as medical recovery appeared to be impossible—was predicated on two theories, one of which alleged the lack of informed consent.

The court emphasized the basis of the requirement of informed consent:

> The root premise is the concept, fundamental in American jurisprudence, that "[e]very human being of adult years and sound mind has a right to determine what shall be

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Cal. Rptr. 158 (1966); Di Filippo v. Preston, 53 Del. 539, 173 A.2d 333 (1961); Govin v. Hunter, 374 P.2d 421 (Wyo. 1962). *See also* Comment, *Informed Consent in Medical Malpractice*, 55 CALIF. L. REV. 1396, 1397 n.5 (1967).

[114]"Whether or not a surgeon is under a duty to warn a patient of the possibility of a specific adverse result of a proposed treatment depends upon the circumstances of the particular case and upon the general practice followed by the medical profession in the locality . . . ." Govin v. Hunter, 374 P.2d 421, 424 (Wyo. 1962).

[115]Karp v. Cooley, 493 F.2d 408 (5th Cir. 1974); Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093 (1960); Aiken v. Clary, 396 S.W.2d 668 (Mo. 1965); Kaplan v. Haines, 96 N.J. Super. 242, 232 A.2d 840 (1967), *aff'd*, 51 N.J. 404, 241 A.2d 235 (1968); Wilson v. Scott, 412 S.W.2d 299 (Tex. 1967); ZeBarth v. Swedish Hosp. Medical Center, 81 Wash. 2d 12, 499 P.2d 1 (1972); Govin v. Hunter, 374 P.2d 421 (Wyo. 1962).

[116]71 N.M. 221, 377 P.2d 520 (1962).

[117]464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

[118]*Id.* at 777.

> done with his own body. . . ." True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each.[119]

Explicit in this part of the opinion is the need for a patient to be informed not only of the risks involved in the treatment proposed by a physician, but also of alternatives to the treatment.

While recognizing that the majority of jurisdictions considering the issue had made the duty depend on whether it was the custom of physicians practicing in the community to make the disclosure to a patient, the court rejected this standard.[120] In place of the medical custom standard, the court used the patient's right of self-decision to shape the boundaries of the duty to reveal:

> That right can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. The scope of the physician's communications to the patient, then, must be measured by the patient's need, and that need is the information material to the decision. Thus the test for determining whether a particular peril must be divulged is its materiality to the patient's decision: all risks potentially affecting the decision must be unmasked.[121]

The scope of disclosure in *Canterbury* becomes a function of a patient's right of self-decision. As a patient is unlearned in medical sciences, he has an abject dependence upon his physician for information on which to base his decision. The physician's disclosure of risks of treatment and possible alternatives must be measured against the patient's need for information. All risks that reasonably might affect the decision must be disclosed. A risk under this standard becomes material when "'a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy.'"[122] Medical

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[119]*Id.* at 780 (quoting Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914)).

[120]The court stated:

> The majority of courts dealing with the problem have made the duty depend on whether it was the custom of physicians practicing in the community to make the particular disclosure to the patient. . . . We do not agree that the patient's cause of action is dependent upon the existence and nonperformance of a relevant professional tradition.

Id. at 783 (footnotes omitted).

[121]*Id.* at 786-87.

[122]*Id.* at 787 (quoting Waltz & Scheoneman, *supra* at 640).

testimony would only be necessary for the determination and explanation of the risks associated with a procedure.[123]

A failure to inform, when treated as negligence, does not create liability unless it has some causal relationship with injury to the patient. Where the patient would not have consented to the medical procedure had full disclosure taken place, and injury develops from the undisclosed risk, lack of informed consent may be said to be the cause of the injury. On the issue of whether consent would have been given had full disclosure taken place, courts have tended to apply an objective standard.[124] As expressed in *Canterbury*,"what a prudent person in the patient's position would have decided if suitably informed of all perils bearing significance."[125]

A privilege to withhold information necessary to form informed consent is recognized in situations where a patient is so ill or emotionally distraught that full disclosure would complicate treatment or pose psychological risks.[126] In determining whether full disclosure may bring on an adverse physical or mental condition in a patient, a health care provider must exercise medical judgment. The critical issue is whether the physician used sound medical judgment in determining that communication of risk information would present a threat to the patient's well-being. An example would be the determination by a physician that full disclosure of risks to a patient suffering from a serious heart condition would raise an unacceptable risk of a heart attack. Although it is entirely proper to consider the custom of the profession in determining whether a physician's judgment as to the danger was negligent, "[t]he privilege does not accept the paternalistic notion that the physician may remain silent simply

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[123]Miller v. Kennedy, 11 Wash. App. 272, 284, 522 P.2d 852, 861 (1974), *aff'd*, 85 Wash. 2d 151, 530 P.2d 334 (1975). The court explained:

> Those elements which are the province of the medical profession must be established by the testimony of medical experts in the field of inquiry. Thus, the existence of the risks and alternatives which were present in the particular physical condition would be beyond the knowledge of the layman and would have to be established by medical testimony.

[124]Prior to *Canterbury*, courts had given little consideration to causation in informed consent cases. *See* Plante, *An Analysis of "Informed Consent"*, 36 FORDHAM L. REV. 639, 667 (1968). *Canterbury*, counter to the assumption of most commentators prior to the decision, applied an objective test. *See* 464 F.2d at 791.

[125]464 F.2d at 791.

[126]*See, e.g.*, Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 317 P.2d 170 (1957); Williams v. Menehan, 191 Kan. 6, 379 P.2d 292 (1963); Twombly v. Leach, 65 Mass. (11 Cush.) 397 (1853). In Ferrara v. Galluchio, 5 N.Y.2d 16, 152 N.E.2d 249 (1958), the plaintiff was permitted to recover for mental anguish from the cancerophobia she developed upon learning from a nondefendant physician that radiation therapy a defendant physician had administered might cause cancer. *See also* Comment, *Informed Consent: The Illusion of Patient Choice*, 23 EMORY L.J. 503 (1974).

because divulgence might prompt the patient to forego therapy the physician feels the patient really needs."[127]

So far as *Canterbury* rejects custom as the controlling standard for informed consent, it has reinforced a tradition in American law which permits an individual to control his bodily integrity.[128] It rejects the notion that all a patient has a right to do is choose his physician, who then makes all other decisions. If informed consent was to remain a viable part of our medical jurisprudence, a rejection of custom was necessary to prevent physicians, instead of patients, from deciding whether risks outweigh potential benefits. However, so far as *Canterbury* fails to discuss the locality rule as it relates to informed consent, it may give the patient more medical expertise than he has either bargained or paid for.

IV. Informed Consent v. The Locality Rule

At the time of the *Canterbury* decision, the District of Columbia courts did not apply the locality rule in medical negligence cases.[129] The court did not, therefore, find it necessary to consider the locality rule as a factor separate from custom in determining the scope of disclosure. Jurisdictions that apply the locality rule, but admit the logic of rejecting medical custom as the controlling standard for disclosure, must consider the issue not dealt with by the District of Columbia court. As we have seen, the locality rule recognized a self-evident truth at the time of its creation: A physician in a small town, who did not necessarily possess a medical degree,[130] did not have the experience, skill, knowledge, or facilities of a physician in a larger and more affluent community. To the extent that a person

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[127]Canterbury v. Spence, 464 F.2d at 789. *But see* Roberts v. Wood, 206 F. Supp. 579 (D. Ala. 1962).

[128]*See, e.g.*, Pratt v. Davis, 224 Ill. 300, 79 N.E. 562 (1906); Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905).

[129]*See* Washington Hosp. Center v. Butler, 384 F.2d 331 (D.C. Cir. 1967); Garfield Memorial Hosp. v. Marshall, 204 F.2d 721 (D.C. Cir. 1953); Byrom v. Eastern Dispensary & Cas. Hosp., 136 F.2d 278 (D.C. Cir. 1943).

[130]At first, physicians in the United States

> learned their trade through observation and practice rather than any formal course of education. In the middle of the nineteenth century any man with an elementary education could become a doctor by taking a course for a winter or two and passing an examination, and even as late as 1900 there were many medical students who could not have gained entrance to a good liberal arts college.

D. Mechanic, Medical Sociology 316-17 (2d ed. 1978) (footnotes omitted). Medical schools in the United States were first subjected to accreditation in 1906 under the AMA Council on Medical Education. Early medical school curriculum consisted of a course of lectures over a period of six months. Formal education was supplemented by apprenticeships with physicians who had even less formal education. Note, *An Evaluation of changes in the Medical Standard of Care, supra* note 36, at 732-33 nn.16 & 17.

chose to use an obviously less qualified medical care provider, he was held to have consented to a lower standard of care.

One aspect of a physician's knowledge is how well he understands the risks involved and the alternatives available. To the degree an ordinary physician in a similar community would not be aware of the risks or of alternative procedures, the locality rule dictates no liability for failure of a particular physician to explain those factors in obtaining consent. This result is not due to medical custom, but because the patient has not bargained for the degree of expertise necessary for the physician to know of the factors. If the particular physician does, in fact, know of the risks or alternatives, he should be required to inform the patient if it would be a material factor in the decision.[131] An alternative method of treatment, even if not available in the patient's community, should be part of the duty to disclose because a reasonable person might well choose to pay the added expense of obtaining treatment away from the locality, if the alternative is local treatment with a higher degree of risk or greater likelihood of failure. Courts must carefully scrutinize this aspect of informed consent in locality rule jurisdictions due to a possible conflict of interest on the part of a physician seeking to retain a patient who would be better served outside the locality, where risks are less and the probability of success greater. Although it may be difficult for some physicians to admit that their skill, knowledge, and experience is less than that of their fellow practitioners in larger communities, the courts must require such disclosure if the difference in fact exists.

The locality rule is an important factor in determining the scope of disclosure required by the doctrine of informed consent. Physicians should not be required to have more knowledge of alternatives and risks than the locality rule would require for other aspects of their relationship with a client. However, this may cause an unfair result when viewed from the eyes of a typical patient. Although the locality rule was based upon factors obvious to a reasonable man when it was created, the difference between a physician in a small town and one in a large community is no longer as evident.

In the eyes of the typical patient-consumer, going to a physician is much like buying an automobile or large appliance. He has little knowledge or understanding of what he is purchasing, but he has expectations of what he will receive.[132] In dealing with consumer pro-

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[131]If a physician has actual knowledge or constructive knowedge (based upon the knowledge a doctor in the same or similar locality should possess) of the risk or alternative treatment, then his duty to disclose would be based upon the patient's need to know. *See* Canterbury v. Spence, 464 F.2d at 786-87.

[132]One commentator stated:

> When the patient visits a physician he comes with an image of the physician's role and the way it should be performed. This image reflects the

ducts, the law has tended to look to the reasonable expectations of the consumer, whether created by specific or implied warranties, and hold the product to that degree of performance.[133] A reasonable patient, or consumer of medical services, in our modern age sees physicians who have all graduated from the same or similar approved schools, undergone the same or similar intern programs, and passed (at least in his state) the same licensing examinations and procedures.[134]

It is no longer reasonable to assume that an individual consents to a lower standard of care by merely consulting a physician in his locality.[135] A more logical rule would be that, absent some evidence showing a patient knew the standard of care was lower than in other areas, an individual has a reasonable expectation that the basic standard of medical competence is the same as in other areas—a reasonable expectation that deserves legal recognition and protection.

Under the doctrine of informed consent, a physician is usually held to have a duty to disclose the risks of a proposed course of treatment, and possible alternatives to the treatment.[136] In jurisdictions presently following the locality rule, one of the risks of any course of treatment is a lower standard of care in the locality, and one of the alternatives is to receive a higher standard of care outside the locality. To the extent that a physician believes or should be aware that a local standard of care is lower than in other communities, he must be required, as part of informed consent, to disclose the possibility of a higher standard of care elsewhere. In the formation of the initial physician-patient relationship, where the physician's function is one of diagnosis, the duty would be to inform a patient that a more accurate diagnosis might be obtained in a larger community where physicians would have more experience in

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societal definition of the physician's role and subcultural expectations as well as the conceptions formed by the patient from prior experience or from hearing about experiences of other people.

D. MECHANIC, *supra* note 130, at 407.

[133]Dunham v. Vaughn & Bushnell Mfg. Co., 42 Ill. 2d 339, 247 N.E.2d 401 (1969). *See also* RESTATEMENT (SECOND) OF TORTS § 402A, Comment g (1965); Keeton, *Products Liability: Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855 (1963); Rheingold, *What Are the Consumer's "Reasonable Expectations?"*, 22 BUS. LAW. 589 (1967).

[134]*See generally Medical Education in the United States 1976-1977*, 238 J.A.M.A. 2761 (1977).

[135]*See* text accompanying notes 55-57 *supra*.

[136]Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Campbell v. Oliva, 424 F.2d 1244 (6th Cir. 1970); Dunham v. Wright, 423 F.2d 940 (3d Cir. 1970); Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972); Bang v. Charles T. Miller Hosp., 251 Minn. 427, 88 N.W.2d 186 (1958). *See* Mills, *Whither Informed Consent?*, 229 J.A.M.A. 305 (1974).

diagnosis and more advanced facilities. Once a course of treatment is decided upon, the physician would have a further duty to inform his patient of alternative forms of treatment not available in the locality and of the possibility that physicians or surgeons in larger communities would have better facilities and more experience in carrying out the treatment and, therefore, have a higher standard of care. A patient who consents to local medical treatment, after having been so informed, may properly be held to have consented to the local standard of care.

V. Conclusion

It should be evident from the foregoing that the locality rule and the doctrine of informed consent are related concepts. During the nineteenth century, when courts in the United States first began to consider claims for legal redress in medical malpractice, the standard of medical care was, in fact as well as law, a local standard. Local medical practitioners in small communities had neither the education nor the experience of their fellow practitioners in larger communities. The courts, in determining the appropriate standard of treatment in the physician-patient contract, took judicial notice of these differences.

During the latter half of the twentieth century, the locality rule has come under increasing attack. Commentators, viewing the modern system for national accreditation of medical schools and statewide licensing procedures, have become less sympathetic to the view that a patient consents to a lower standard of care by consulting a local physician in a small community. Some have gone so far as to predict the demise of the rule.

While the locality rule has come under increasing attack, another doctrine, informed consent, has been waxing strong in the opinions of courts and commentators. As related, the doctrine of informed consent requires that a patient be given the information necessary for him to determine if he desires to undergo the treatment recommended by his physician. Two different standards have been applied by courts in determining the scope of this disclosure: the medical custom standard which views the issue as one to be determined by considering what a reasonable medical practitioner under similar circumstances would have disclosed, and the standard of what a reasonable patient would want to know before deciding on a course of treatment used in *Canterbury*.

Both the doctrine of informed consent and the locality rule have at their root the concept that the physician-patient relationship is one that must be based on consent. Under the locality rule, this consent is presumed to include consent to the standard of care found in

the locality. At the time of its creation, the obvious differences between a physician in a small town and a practitioner in a major community made the presumption of the locality rule reasonable. As the obvious differences have declined, although real differences continue to exist, it becomes more difficult to assume that a patient is aware of the lower standard of care available in his community. It is at this point the locality rule and informed consent coalesce. By disclosing to the patient the true nature of the standard of care in the community, and relating alternative treatments available in other communities, a physician permits his patient to make a choice. If the patient consents to treatment by local practitioners, after receiving this information, he has given informed consent to the locality rule.

Notes

Injuries Resulting from Nonintentional Acts in Organized Contact Sports: The Theories of Recovery Available to the Injured Athlete

" 'There are two great national institutions which simply cannot tolerate . . . external interference: Our Armed Forces and our . . . sports programs.' "[1]

I. Introduction

Organized athletics once enjoyed virtual immunity from litigation and liability. In recent times changes in philosophy concerning intervention in the world of sport[2] have been dramatic.[3] Judicial review has permeated many aspects of organized athletics,[4] yet new frontiers remain to be developed.

Recently, a new chapter in sports litigation began when an Illinois appellate court held that a participant in a contact sport may be found liable in tort for injuries he nonintentionally inflicted upon another participant.[5] The purpose of this Note is threefold: To examine this new chapter of sports litigation in light of the relative historical and legal perspectives surrounding the law and organized athletics, to analyze the rule holding participants in contact sports liable for negligence in the context of the cases which have sought to interpret it, and to explore the possible continued and expanded application of this rule by future courts.

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[1]Slusher, *Sport: A Philosophical Perspective*, 38 Law & Contemp. Prob. 129, 129 (1973) (quoting Dr. Max Rafferty, former Superintendent of Public Instruction for the State of California) (emphasis added).

[2]"Sport" has been defined as an "element of enjoyment or recreation arising from the development or practice of individual skills, different from those involved in routine daily activities." Newman Importing Co. v. United States, 415 F. Supp. 375, 376 (Cust. Ct. 1976). For the purposes of this Note, only those sports characterized as "organized," in which participants are divided into teams and governed by a recognized set of rules, will be considered.

[3]External interferences in sports programs are no longer considered intolerable. One commentator, speaking of football, has stated that the legal profession is one of the few groups taking steps to stem the flood of injuries in that sport. Underwood, *An Unfolding Tragedy*, Sports Illustrated, Aug. 14, 1972, at 72.

[4]*See, e.g.*, Flood v. Kuhn, 407 U.S. 258 (1972) (determining the validity of professional baseball's reserve clause); Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976) (applying the Sherman Act, 15 U.S.C. §§ 1-7 (1976), to professional football); Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975) (applying the Sherman Act to professional basketball).

[5]Nabozny v. Barnhill, 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975).

A. Sports-Related Injuries

"'*If the United States ignored an annual epidemic striking a million and a half youngsters each autumn, Americans would revolt.*' "[6]

Shaping this new chapter of sports law—to an extent rivaled, perhaps, by no other consideration—is the fact that sports-related injuries have reached epidemic proportions. A one-year survey of athletic injuries and deaths in secondary schools and colleges revealed that between 1975 and 1976 over one million injuries occurred in school and college athletic programs.[7] Of these, 111,098 were classified as major injuries, forcing the person to cease the activity for more than twenty days.[8] In addition, the schools and colleges in the sample[9] reported fourteen deaths as a result of sports activities.[10] One example of the impact of athletics-related injuries is provided by the LaPorte (Indiana) High School football team, which, during the 1977 season, suffered the loss of fifteen lettermen due to serious injuries, including four broken backs and four broken legs.[11] The effect of this large number of athletics-related injuries is a public attitude bent on reform *and accountability* not unlike that in 1905 when, due to one of the bloodiest football seasons in history,[12] President Theodore Roosevelt threatened to abolish football by executive order unless the level of violence in the game was dramatically reduced.[13] In that year the presidential threat was sufficient to cause internal changes and thus to avoid possible major legal intervention in the world of athletics, yet today, as one commentator noted: "No Teddy Roosevelts have risen up to protest the slaughter."[14]

B. The Response by the Courts to the Epidemic of Sports-Related Injuries

The courts have already begun to respond to the public sentiment demanding, if not reform, accountability. While many of the

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[6]Underwood, *supra* note 3, at 71 (quoting Dr. James Barrick, University of Washington Sports Medicine Department).

[7]NATIONAL CENTER FOR EDUCATION STATISTICS, ATHLETIC INJURIES AND DEATHS IN SECONDARY SCHOOLS AND COLLEGES, 1975-76, A REPORT ON THE SURVEY MANDATED BY SECTION 826 OF PUBLIC LAW 93-380, at 22 (1977).

[8]*Id.*

[9]The sample included 1,246 colleges and 2,525 secondary schools. *Id.* at 48-49.

[10]*Id.* at 24. Unlike other figures in the report, the number of deaths listed was the actual number reported by the institutions in the sample, not an estimated national total. *Id.*

[11]Underwood, *supra* note 3, at 71.

[12]In that year 19 college players died of football-related injuries. *Id.* at 72.

[13]Markus, *Sport Safety: On the Offensive*, 8 TRIAL July/Aug. 1972, at 12.

[14]Underwood, *supra* note 3, at 72.

causes of action now available to the injured athlete are not central to the main issues presented in this Note, a brief discussion of two causes of action would be helpful to an understanding of the relationship between sports and the legal system: Products liability for the manufacture or distribution of unsafe athletic equipment and negligence for the failure to provide adequate supervision of sporting events.

1. Products Liability and Athletic Equipment.—The fact that athletic equipment is involved does not change the basic theory under which one recovers for a defective product whose use has resulted in injury to its user.[15] These cases are important because suits of this type are occurring with greater frequency, and with a corresponding increase in the probability that an aggrieved party will either obtain a settlement or will be granted an award by the court. Perhaps most indicative of this trend are actions involving the hard-shell football helmet. While the hard-shell helmet has come under attack for injuries resulting from its use against another player in a manner resembling that of a "battering ram,"[16] litigation stems mainly from injuries sustained by the person wearing it.[17]

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[15]*See, e.g.*, Byrns v. Riddell, Inc., 113 Ariz. 264, 550 P.2d 1065 (1976). In *Byrns*, plaintiff was seeking recovery in a products liability action for injuries he received resulting from his use of an allegedly defective Riddell TK-2 football helmet.

The court, vacating a directed verdict for the manufacturer, said that the theory of recovery for products liability in Arizona was that outlined in the RESTATEMENT (SECOND) OF TORTS § 402A (1965). 113 Ariz. at 266, 550 P.2d at 1067 (citing U.S. Stapley Co. v. Miller, 104 Ariz. 556, 447 P.2d 248 (1968)). The court also adopted the *Restatement* position that plaintiff must establish that the product was "unreasonably dangerous," as defined by Dorsey v. Yoder Co., 311 F. Supp. 753 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3d Cir. 1973), on the theory that the use of this test effectively limited the strict liability in tort doctrine if the issue was one of the duty of safe design by the manufacturer, or there were serious questions as to the effect to be given harm-producing conduct or misuse on the part of the injured person. 113 Ariz. at 267, 550 P.2d at 1068. *See also* Annot., 54 A.L.R.3d 352 (1973).

The court was careful to point out, however, that, in determining whether a product was unreasonably dangerous, "[e]ach case must be decided on its own merits." 113 Ariz. at 267, 550 P.2d at 1068. "No all-encompassing rule can be stated with respect to the applicability of strict liability in tort to a given set of facts." *Id.*

Finally, plaintiff was also held to have the burden of showing that the defective condition of the injury-producing product existed at the time it left the hands of the seller and that a relationship existed between the defect and the injury. *Id.* at 268, 550 P.2d at 1069.

[16]"[A] five year study of college [football] players by Dr. Carl Blyth at the University of North Carolina . . . found that 29% of football's most serious injuries—brain and spinal cord damage, broken ribs, ruptured spleens, bruised kidneys—came as a direct result of external blows by hard shell helmets." Underwood, *supra* note 3, at 74.

[17]In 1977 a 21 year-old Dade County, Florida youth was awarded $5.3 million in damages against Riddell Incorporated, a major manufacturer of football helmets, for injuries received by him resulting from his use of a negligently designed helmet. Plaintiff, a quadriplegic, settled out of court for a reported three million dollars. *Id.* at 73. *See also* Byrns v. Riddell, Inc., 113 Ariz. 264, 550 P.2d 1065 (1976).

"Nationwide, helmet manufacturers now face between $116 million and $150 million"[18] in suits based on defective design, nearly 100 times the annual profit of the industry.[19]

In Indiana, two cases have considered a manufacturer's liability for the production of defective athletic equipment.[20] Each serves as additional evidence of the continued erosion of the so-called de facto immunity from litigation and liability once enjoyed by organized athletics.[21]

2. Liability for Failure to Provide Adequate Supervision of an Athletic Event.—The public's quest for accountability for sports-related injuries has produced well-developed case law holding teachers, coaches, schools, and school districts liable for injuries to student athletes resulting from the failure to provide adequate supervision of sporting events.[22] Inherent in the cases is the question of whether the action is barred by the doctrine of sovereign immunity or a general immunity statute.[23] If these issues are not involved, the theory of recovery is much like that presented in *Carabba v. Anacortes School District No. 103.*[24] *Carabba* involved a student wrestler who became a quadriplegic as a result of an illegal wrestling hold[25] that was applied to him when the referee momentarily diverted his attention from the mat.[26]

The court held[27] that the duty owed by a school district to its pupils was the same as that outlined in *Tardiff v. Shoreline School District:*[28]

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[18]Underwood, *supra* note 3, at 73.

[19]*Id.*

[20]In the first, a manufacturer was found liable because a pair of baseball sunglasses shattered when struck by a ball, causing the loss of a player's eye. Filler v. Rayex Corp., 435 F.2d 336 (7th Cir. 1970). The second imposed liability on the manufacturer of a baseball pitching machine containing latent defects which resulted in severe facial injuries to a high school student who was able to trigger the machine while it was unplugged. Dudley Sports Co. v. Schmidt, 151 Ind. App. 217, 279 N.E.2d 266 (1972).

[21]*See* 12 GA. L. REV. 380, 382 (1978).

[22]*See* Annot., 35 A.L.R.3d 725 (1971).

[23]*See* Annot., 33 A.L.R.3d 703 (1970).

[24]72 Wash. 2d 939, 435 P.2d 936 (1967).

[25]The hold was described by an eye witness as a "full nelson." *Id.* at 943, 435 P.2d at 939.

[26]*Id.* The plaintiff alleged that the school district had a nondelegable duty to protect students participating in interscholastic wrestling matches on the school premises. The school district contended that it had no part in this wrestling competition; that the matches were sponsored by the associated student bodies, which were separate entities from the school districts; and that the referee, in the performance of his function, occupied the status of an independent contractor. *Id.* at 955, 435 P.2d at 946.

[27]*Id.*

[28]68 Wash. 2d 164, 411 P.2d 889 (1966).

> [The school district is required to] anticipate reasonably foreseeable dangers and to take precautions protecting the children in its custody from such dangers. The child may sue the school district for injuries resulting from its failure to protect the child.
>
> "[A] school district may be liable for injuries sustained as a result of negligent supervision or failure to supervise activities of its students."[29]

In addition, the court held that the same duty applied whether the students were engaged in a voluntary or required activity,[30] that the duty was not limited to situations involving curricular activities,[31] and that the duty could not be satisfied by delegating its performance to another.[32] Therefore, "if the referee was negligent, the school district must, as a matter of law, respond in damages."[33]

It is thus apparent that courts today are becoming increasingly willing to subject organized athletics to judicial scrutiny. Of the many possible reasons given for this shift away from the de facto immunity from legal review once enjoyed by athletics, perhaps the most telling are the aforementioned increases in the number and severity of sports-related injuries,[34] and the violent nature of sports today at all levels of competition.[35]

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[29]72 Wash. 2d at 955, 435 P.2d at 946 (quoting 68 Wash. 2d at 170, 411 P.2d at 893).

[30]*Id.* at 955-56, 435 P.2d at 947. *See also* Sherwood v. Moxie School Dist. No. 90, 58 Wash. 2d 351, 363 P.2d 138 (1961); Morris v. Union High School Dist. A., 160 Wash. 121, 294 P. 998 (1931).

[31]72 Wash. 2d at 955-56, 435 P.2d at 947.

[32]*Id.* at 957, 435 P.2d at 947-48. The RESTATEMENT (SECOND) OF AGENCY § 214, Comment a (1958), states in part:

> [O]ne may have a duty to see that due care is used in the protection of another, a duty which is not satisfied by using care to delegate its performance to another but is satisfied if, and only if, the person to whom the work of protection is delegated is careful in giving the protection.

[33]72 Wash. 2d at 958, 435 P.2d at 948. The court also considered the question of whether the trial court erred in not submitting the question of plaintiff's assumption of risk to the jury. While the assumption of risk defense will be considered in much greater detail later in this Note, it should be observed at this point that the court held there was no error because one is never held to assume the risk of another's negligence or incompetence. *Id.* For a discussion of the assumption of risk doctrine, see note 49 *infra*.

[34]For example, in Minnesota alone there were 48 eye injuries to hockey players in 1975 and nearly one-fifth of them resulted in blindness. Yeager, *The Savage State of Sports*, PHYSICIAN & SPORTS MED., May, 1977, at 96. In addition, it is estimated that nearly 30 Americans die each year playing amateur football, while serious injuries in the National Football League jumped by 25% from the 1973 to the 1974 season, according to Stanford Research Institute study. *Id.*

[35]There are many explanations given for the increasing use of violence in sports. Some authorities contend that violence has been perceived by athletes as crucial for

II. Participant's Liability in Tort for Injuries Inflicted upon Another Participant During the Course of an Organized Athletic Event

The development of the law in this area has echoed the changes in public and judicial sentiment regarding interferences by the legal system in the athletic arena. These developments have provided the framework for the current status of liability between participants in organized contact sports.

Courts have generally recognized two theories of tort liability in actions involving participants injured at the hands of opposing players: intentional torts and negligence. Early commentators con-

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success in competitive sports. *See* Yeager, *supra* note 34, at 94. Still others place the blame on coaches who use violence as a compensation for their team's lack of playing ability. *See* TIME, Feb. 24, 1975, at 53. In addition, some authorities contend that violence in professional sports is used as a means of selling tickets. *Id.* at 48, 54.

The effect of athletic violence on sports spectators has also been a topic of major concern. Many authorities contend that the increase in number and severity of violent acts by spectators is a product of the violence displayed by athletes on the playing field. *See, e.g.*, Yeager, *supra* note 34, at 96. An example of spectator violence was provided when hundreds of drunken baseball fans went on a rampage, assaulting players, umpires, and each other at Cleveland's Municipal Stadium in 1974. *Id.*

Concern has also been expressed over the extensive television coverage given to violent acts in sporting events and its effect on children who tend to copy the actions of their athlete-heroes. *See* Kanfer, *Doing Violence to Sport*, TIME, May 31, 1976, at 65. For example, a report by Canada's Royal Commission on Violence in the Communications Industry concluded that televised coverage of violence in professional ice hockey has resulted in the same type of violence being exhibited in youth hockey programs. *Id.*

There have, however, been efforts to control the violent nature of sports. For example, a particularly bloody fight in a professional hockey game where one player repeatedly slammed an opposing player's head to the ice resulted in the first criminal trial of a professional athlete in the United States for injuries inflicted during a game. State v. Forbes, No. 63280 (Minn., Hennepin Dist. Ct., filed Jan. 14, 1975, *judgment of mistrial entered*, Aug. 12, 1975), *noted in Consent in Criminal Law: Violence in Sports*, 75 MICH. L. REV. 148 (1976); *Violence in Professional Sports*, 1975 WIS. L. REV. 771; *Criminal Law: Consent as a Defense to Criminal Battery—the Problem of Athletic Contests*, 28 OKLA. L. REV. 840 (1975).

Despite efforts to the contrary, violence in sports persists. On September 12, 1976, in a professional football game between the Pittsburgh Steelers and Oakland Raiders, Oakland defensive back George Atkinson rushed up behind Pittsburgh wide receiver Lynn Swann and struck him with a forearm to the base of his helmet, all while the play continued 15 yards away. The blow dropped Swann "as if he were shot," Johnson, *A Walk on the Sordid Side*, SPORTS ILLUSTRATED, Aug. 1, 1977, at 12, resulting in a concussion. Atkinson's actions prompted Pittsburgh head coach Chuch Noll to label Atkinson as part of "a criminal element" in the National Football League, to which Atkinson responded by filing a slander suit against Noll. The suit was eventually decided in Noll's favor. *Id.* at 12-15.

Finally, one commentator has labeled athletic violence as the "most shocking" form of violence, "done merely for sport or fun." Kanfer, *supra* note 35, at 64 (quoting political scientist James Q. Wilson).

sidered recovery for negligence "out of the question,"[36] and judicial intervention focused on intentional torts, particularly assault and battery.[37] Even when a negligence theory of recovery was finally accepted, it was almost exclusively applied in cases involving non-contact sports.[38] Finally, in 1975 an American court held, for the first time, that a plaintiff could recover for injuries sustained as the result of a nonintentional act in a contact sport.[39]

A. Intentional Torts

The earliest theory successfully relied upon by a sports plaintiff was that of intentional tort, that is, assault and battery. A defendant is liable for battery if he acts with intent to cause a harmful or offensive contact upon a person and such contact results from his act.[40] He is liable for assault if, with the same intent, the plaintiff is put in imminent apprehension of a battery.[41] *Griggas v. Clauson*,[42] which involved participants in an amateur basketball game, provides an example of recovery based on assault and battery. A nineteen-year-old plaintiff, while awaiting a pass from a teammate, suffered serious injuries when the defendant, a member of the opposing team, pushed him from behind, struck him in the face with his fist, and struck him again as he fell, knocking him unconscious. The court affirmed a jury verdict in favor of the plaintiff, stating that the evidence showed defendant's actions to be wanton and unprovoked, and established the intent necessary to maintain recovery for an action for assault and battery.[43]

Even this theory was limited in its effect, however, as early cases held that recovery was proscribed under the maxim *volenti non fit injuria*—he who consents cannot receive an injury.[44] Later,

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[36]26 MICH. L. REV. 322, 322 (1927).

[37]*See, e.g.*, Thomas v. Barlow, 5 N.J. Misc. 764, 138 A. 208 (N.J. 1927).

[38]*See, e.g.*, Tavernier v. Maes, 242 Cal. App. 2d 532, 51 Cal. Rptr. 575 (1966); Strand v. Conner, 207 Cal. App. 2d 473, 24 Cal. Rptr. 584 (1962); Mann v. Nutrilite, Inc., 136 Cal. App. 2d 729, 289 P.2d 282 (1955); Carroll v. Askew, 119 Ga. App. 224, 166 S.E.2d 635 (1969); Bourque v. Duplechin, 331 So. 2d 40 (La. Ct. App. 1976); Benedetto v. Travelers Ins. Co., 172 So. 2d 354 (La. Ct. App. 1965); Niemczyk v. Burleson, 538 S.W.2d 747 (Mo. Ct. App. 1976). *See also* 12 GA. L. REV. 380, 380-82 (1978).

[39]Nabozny v. Barnhill, 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975). For the purposes of this Note, "contact sport" will be defined as any sport where more than a casual touching is accepted as part of the game. It is not necessary that the contact be a purpose of the sport, *but see* 45 C.F.R. § 86.41 (1978), as long as it is unavoidable and an accepted element of the game.

[40]RESTATEMENT (SECOND) OF TORTS § 13 (1965).

[41]*Id.* § 21. Sports litigation usually involves either a battery alone or both elements. *See* Note, *Violence in Professional Sports*, 1975 WIS. L. REV. 771, 774 n.23.

[42]6 Ill. App. 2d 412, 128 N.E.2d 363 (1955).

[43]*Id.* at 418, 128 N.E.2d at 366.

[44]*See* F. BURDICK, THE LAW OF TORTS § 84, at 112-13 (4th ed. 1926).

the law developed so that a participant in a sport was deemed to consent only to such contacts allowed by the rules and customs of the game, with recovery available for contacts which went beyond the scope of such rules and customs, especially if the rules were designed to protect the players and not merely to promote better playing of the game. The *Restatement (Second) of Torts* states:

> Taking part in a game manifests a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by its rules or usages. Participating in such a game does not manifest consent to contacts which are prohibited by rules or usages of the game if such rules or usages are designed to protect the participants and not merely to secure the better playing of the game as a test of skill. This is true although the player knows that those with or against whom he is playing are habitual violators of such rules.[45]

Therefore, a participant in a contact sport, by the fact of his participation, would be held to consent to those contacts which are inherent in the game itself, but would not consent to an *intentional* violation of a rule designed to protect his safety.

B. Negligence

Retarding the development of recovery for a participant's negligence was the fear that the imposition of liability in such cases would discourage participation in sports-related activities. Some jurisdictions have, in fact, denied recovery to an injured plaintiff partly on the basis of this threat. *Gaspard v. Grain Dealers Mutual Insurance Co.*[46] involved a twelve-year-old participant in a baseball game whose bat had slipped from his hands and struck a fellow player. While it was the plaintiff's contention that the condition of the bat should have alerted the defendant to the possibility that it could slip from his hands and injure someone, the court found the defendant to be not negligent. The court stated that "[t]o impose liability under such circumstances would . . . render the participation of the children of this State in almost any game or sport a practical impossibility . . . ."[47]

In addition, courts have invoked the doctrine of assumption of risk[48] to bar recovery in sports-related cases.[49] Paralleling the

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[45]RESTATEMENT (SECOND) OF TORTS § 50, Comment b (1965).

[46]131 So. 2d 831 (La. Ct. App. 1961).

[47]*Id.* at 833.

[48]In Indiana, an injured party's right to recovery may be defeated by the doctrine of assumption of risk if a contractual relation exists, or by the doctrine of incurred risk if the relation is noncontractual. Pierce v. Clemens, 113 Ind. App. 65, 76, 46 N.E.2d

decline in the de facto immunity from liability once enjoyed by organized athletics is the increased willingness by the courts to

836, 840 (1943). For the purposes of this Note, the term "assumption of risk" will be used to describe the doctrine's application to both contractual and noncontractual relationships.

[49]In sports litigation, assumption of risk is usually implied rather than expressed. The general rule is stated as follows:

> A voluntary participant in any lawful game, . . . in legal contemplation by the fact of his participation, assumes all risks incidental to the particular game, . . . which are obvious and foreseeable. But he does not assume an extraordinary risk which is not normally incident to the . . . sport . . . unless he knows about it and voluntarily assumes it.

4 AM. JUR. 2d *Amusements and Exhibitions* § 98 (1962) (footnotes omitted). Further, he does not assume the risk of injury from the negligence of others. *Id.*

The relationship between assumption of risk and contributory negligence has been a source of confusion not only in Indiana, but also in the field of sports litigation as a whole. On at least one occasion, a court dealing with a sports-injury case overlooked plaintiff's assumption of risk to hold instead that plaintiff was contributorily negligent. Boynton v. Ryan, 257 F.2d 70 (3d Cir. 1958) (golf). It has been held in Indiana that the two doctrines are separate and distinct. *See* Indiana Natural Gas & Oil Co. v. O'Brien, 160 Ind. 266, 65 N.E. 918 (1903); Fruehauf Trailer Div. v. Thornton, 366 N.E.2d 21 (Ind. Ct. App. 1977). Other Indiana decisions have stated that the doctrine of "incurred risk" is merely a "species of contributory negligence." Rouch v. Bisig, 147 Ind. App. 142, 151, 258 N.E.2d 883, 888 (1970). *See also* Cleveland, C., C. & St. L. Ry. v. Lynn, 177 Ind. 311, 95 N.E. 577 (1911); Emhardt v. Perry Stadium, Inc., 113 Ind. App. 197, 46 N.E.2d 704 (1943).

The confusion in distinguishing the two defenses under Indiana law has been due in large part to two factors. First, there has been an infusion of the objective "reasonable man" test into the "incurred risk" concept. Stallings v. Dick, 139 Ind. App. 118, 210 N.E.2d 82 (1965). *See also* Meadowlark Farms, Inc., v. Warken, 376 N.E.2d 122 (Ind. Ct. App. 1978); Petroski v. Northern Ind. Pub. Serv. Co., 354 N.E.2d 736 (Ind. Ct. App. 1976); Sullivan v. Baylor, 163 Ind. App. 600, 325 N.E.2d 475 (1975); Christmas v. Christmas, 159 Ind. App. 193, 305 N.E.2d 893 (1974); Cornette v. Searjeant Metal Prods., Inc., 147 Ind. App. 46, 258 N.E.2d 652 (1970). Second, courts have erroneously applied the requirement of knowledge and appreciation of a peril for the finding of contributory negligence. Hi-Speed Auto Wash, Inc. v. Simeri, 346 N.E.2d 607 (Ind. Ct. App. 1976). *See also* Rouch v. Bisig, 147 Ind. App. 142, 258 N.E.2d 883 (1970). *But see* Burger v. National Brands, Inc., 342 N.E.2d 870 (Ind. 1976).

The Indiana Court of Appeals in Kroger v. Haun, 379 N.E.2d 1004 (Ind. Ct. App. 1978), deemed it "appropriate and necessary . . . to reconcile the incongruity of these decisions and . . . develop a consistency in the use and application of the defenses." *Id.* at 1008. In *Kroger* the court thus reinstated a subjective standard of knowledge in the assumption of risk defense, stating: "We are of the belief that to hold that one may voluntarily incur a risk of which he had no actual knowledge, yet was required to know in the exercise of ordinary care, is a perversion of the doctrine." *Id.* at 1009. In addition, the court rejected actual knowledge and appreciation of a peril as controlling elements of contributory negligence, stating: "We believe the actual state of the law to be . . . that contributory negligence may be found either where plaintiff has actual knowledge of the danger, *or, in the exercise of reasonable care, should have appreciated or anticipated the danger.*" *Id.* at 1010-11 (emphasis added). By so holding, the Indiana court has placed this state's interpretation of the two defenses in a position more in line with that used by other jurisdictions in their determinations of sports-related injury cases. The decision has also rendered application of these doctrines in Indiana significantly easier in future cases.

limit the defense of assumption of risk to those risks that are an obvious or foreseeable part of the game. In order to determine those risks which are considered an obvious or foreseeable part of the game, the courts have considered each individual game on an ad hoc basis. Therefore, while a second baseman in a baseball game assumes the risk of being spiked by a runner sliding into the base,[50] he does not assume the risk of being struck by the runner at full speed five feet from the base.[51] Other risks which courts have deemed to be assumed include stray golf balls,[52] pitched softballs,[53] and baseball bats thrown after the batter has hit the ball,[54] while generally, those risks which have not been deemed to be obvious or inherent parts of their games, and thus not assumed, are those caused by the negligence of another participant.[55]

Likewise, the standard of conduct owed by participants in athletic contests also seems to vary from case to case. For example, one case[56] held that a participant in an athletic event must not act in a manner that would expose those around him to an unreasonable risk of harm,[57] while another case[58] approached the problem from a duty perspective, stating that the duty owed by one participant to another in a team sport is a function of the customs and rules of that game.[59]

While the standard of conduct which will be applied to participants in organized athletic events is still flexible, emerging from those cases considering whether a participant in an athletic contest may be held liable to a fellow participant for the negligent infliction of an injury is a standard based on the rules and customs of the game. This rationale draws heavily from the limitations on the consent defense; a person is deemed not to consent to those contacts which are prohibited by the rules or usages of the game.[60]

Those cases which have considered recovery for negligence, however, regardless of the precise standard used to define negligent conduct, have dealt primarily with noncontact sports.[61] The inherent

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[50]Tavernier v. Maes, 242 Cal. App. 2d 532, 51 Cal. Rptr. 575 (1966).

[51]Bourque v. Duplechin, 331 So. 2d 40 (La. Ct. App. 1976).

[52]Strand v. Conner, 207 Cal. App. 2d 473, 24 Cal. Rptr. 584 (1962).

[53]Mann v. Nutrilite, Inc., 136 Cal. App. 2d 729, 289 P.2d 282 (1955).

[54]Richmond v. Employers' Fire Ins. Co., 298 So. 2d 118 (La. Ct. App. 1974).

[55]*See, e.g.*, Carroll v. Askew, 119 Ga. App. 224, 166 S.E.2d 635 (1969) (golf); Niemczyk v. Burleson, 538 S.W.2d 737 (Mo. Ct. App. 1976) (baseball).

[56]Mann v. Nutrilite, Inc., 136 Cal. App. 2d 729, 289 P.2d 282 (1955).

[57]*Id.* at 734, 289 P.2d at 285.

[58]Tavernier v. Maes, 242 Cal. App. 2d 532, 51 Cal. Rptr. 575 (1966).

[59]*Id.* at 545, 51 Cal. Rptr. at 583. *See also* Niemczyk v. Burleson, 538 S.W.2d 737 (Mo. Ct. App. 1976).

[60]RESTATEMENT (SECOND) OF TORTS § 50, Comment b (1965).

[61]*See* note 38 *supra.*

physical nature of contact sports has presented special problems for the courts and, until recently, no American jurisdiction has allowed recovery for injury in a contact sport based upon the negligence of a participant.

C. *Nonintentional Acts by Participants in Contact Sports Resulting in Injuries to Fellow Participants*

In 1975, an Illinois appellate court in *Nabozny v. Barnhill*[62] held that a participant in a contact sport may be liable in tort to a fellow participant for injuries nonintentionally inflicted upon him during the course of the game.[63] *Nabozny* became the self-proclaimed harbinger of "a new field of personal injury litigation."[64] Its holding and application by courts in other jurisdictions merit special attention.

1. Facts of the Case.—Plaintiff's injuries occurred during a high school soccer match between plaintiff's Hansa team and defendant's Winnetka team. During the contest, the ball was kicked over the midfield line in the general direction of the plaintiff. Defendant and one of plaintiff's teammates had pursued the free ball. The Hansa player had reached the ball first and, being closely pursued by defendant, had passed the ball on to plaintiff, his goalkeeper. He then sharply turned away and headed back upfield. Plaintiff, in the meantime, had gone down on his left knee and caught the pass from his teammate. Defendant, however, had not turned away, but had continued to run in the direction of plaintiff, kicking the left side of plaintiff's head, causing permanent skull and brain damage. Plaintiff brought suit to recover for personal injuries alleged to be the result of defendant's negligence.

At the trial, plaintiff's expert witnesses testified that according to the Federation Internationale de Football Association (F.I.F.A.)[65] Official Rules of Soccer, under which the game in question was being played, all players are prohibited from coming into contact with a goalkeeper who is in possession of the ball while in the penalty area.[66] In addition, testimony established that plaintiff at all times

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[62]31 Ill. App. 3d 212, 334 N.E.2d 258 (1975).

[63]*Id.* at 215, 334 N.E.2d at 261.

[64]*Id.* In Moore v. Jones, 120 Ga. App. 521, 171 S.E.2d 390 (1969), the court considered in dictum a question very similar to that in *Nabozny*:

> Assuming, without deciding, that where a sixteen year old boy plays soccer as required in a school physical education period, he assumes the risk of injury from the negligent act of an opposing player which may likely occur during such a game and could recover only for a willful and wanton act of such opposing player causing an injury, as distinguished from ordinary negligence ....

Id. at 521-22, 171 S.E.2d at 391 (citations omitted).

[65]The governing body of soccer. 2 ENCYCLOPAEDIA BRITANNICA 210 (1976).

[66]The "penalty area" is a rectangular area in front of the goal that is 18 yards in length and 44 yards in width. *Id.* at 212.

remained within the penalty area, and that defendant had time to avoid contact with plaintiff.[67]

At the close of plaintiff's evidence, defendant moved for a directed verdict, which the trial court granted on the ground that defendant owed no legal duty of care to the plaintiff.[68] After considering the question of whether the necessary relationship existed between the parties so as to impose a legal duty upon one for the benefit of the other,[69] the appellate court reversed the directed verdict of the trial court.[70]

2. The Opinion.—Important to the analysis of *Nabozny* is the policy consideration that a natural reluctance to compete in a game or sport would arise if the participants were threatened with possible liability for injuries resulting from their participation.[71] The court in *Nabozny*, however, expressed the view that, while great care should be taken to assure the free and active participation in athletics,[72] organized athletics should not be completely free of judicial review. The court stated: "[A]thletic competition does not exist in a vacuum. Rather, some of the restraints of civilization must accompany every athlete onto the playing field. One of the educational benefits of organized athletic competition to our youth is the development of discipline and self control."[73]

The court appeared to be balancing the policy consideration set forth above with an equally basic premise of tort law that a person injured through the fault of another should be compensated by requiring the party at fault to pay damages to the injured party. This analysis was reflected in the court's holding, described as "carefully drawn . . . in order to control a new field of personal injury litigation."[74] The court held that if: (1) The teams are trained and coached by knowledgeable personnel, (2) a recognized set of rules governing participation in the game is in force and (3) a safety rule[75] is contained therein which is primarily designed to protect players from serious injury, a player is charged with a legal duty to every other player

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[67]31 Ill. App. 3d at 214, 334 N.E.2d at 260.

[68]*Id.* at 213, 334 N.E.2d at 259.

[69]The court also considered, and rejected, defendant's contention that plaintiff was contributorily negligent as a matter of law. *Id.* at 215, 334 N.E.2d at 261.

[70]*Id.* at 215-16, 334 N.E.2d at 260-61.

[71]*See* Gaspard v. Grain Dealers Mut. Ins. Co., 131 So. 2d 831, 833-34 (La. Ct. App. 1961).

[72]"This court believes that the law should not place unreasonable burdens on the free and vigorous participation in sports by our youth." 31 Ill. App. 3d at 215, 334 N.E.2d at 260.

[73]*Id.*

[74]*Id.*, 334 N.E.2d at 261.

[75]A safety rule is a rule designed, not to secure the more skillful or entertaining performance of the sport, but rather to protect the players from serious injury. *Id.*, at 260.

on the field to refrain from conduct proscribed by such safety rule,[76] and if such a player causes injury through conduct that is either deliberate, willful, or done with a reckless disregard for the safety of another player, the offending participant may be held liable in tort for the injury inflicted.[77]

3. Interpretation.—The wording employed by the court in its holding is, at best, confusing.[78] Based upon this holding, differing standards of conduct—all claiming to be drawn from the precedent set in *Nabozny*—could be applied by future courts to cases involving injuries to participants in contact sports. If *Nabozny* is to function as the narrowly tailored rule that it professed to create, a determination of the standard of conduct the case was intended to establish is important.

The question thus becomes: What standard of conduct did the court in *Nabozny* intend to establish?[79] The language employed by the court in the holding provides, on first impression, a possible answer. *Nabozny* stated: "A reckless disregard for the safety of other players cannot be excused. To engage in such conduct is to create an intolerable and unreasonable risk of serious injury to other participants."[80] Further, in the second part of the *Nabozny* holding, the court stated that a participant is liable if his conduct is either deliberate, willful, or done with a reckless disregard for the safety of his fellow participants.[81] Language such as this has generally been applied to a standard of conduct lying between ordinary negligence and intentional tort, and has been characterized by a variety of names, including "aggravated negligence," "reckless misconduct," or, merely, "recklessness."[82] Thus, one answer consistent with the language used by the court would be that *Nabozny*

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[76]*Id.*, 334 N.E.2d at 260-61.

[77]*Id.*, 334 N.E.2d at 261.

[78]The precise language used by the court to express the second part of its holding was: "It is our opinion that a player is liable for injury in a tort action if his conduct is such that it is either deliberate, wilful or with reckless disregard for the safety of the other player so as to cause injury to that player . . . ." *Id.*

[79]Other commentators attempting to provide an answer to this question have produced differing results. *Compare* 42 Mo. L. Rev. 387 (1977) *with* 45 U.M.K.C. L. Rev. 119 (1976).

[80]31 Ill. App. 3d at 215, 334 N.E.2d at 261.

[81]*Id.*

[82]*See, e.g.*, W. Prosser, The Law of Torts § 34, at 184 (4th ed. 1971). *See also* Restatement (Second) of Torts § 500 (1965) which states in part:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Id. Comment g reads as follows:

was intended to enuciate a standard of conduct based upon such an independent standard of review. This answer, however, would not be consistent with the remainder of factors considered by the court in reaching its decision. Implicit in the standard of conduct known as, for want of a better alternative, "reckless misconduct," is the rule that ordinary contributory negligence on the part of the plaintiff is not a defense available to the defendant.[83] While a plaintiff's reckless disregard for his own safety is a defense to reckless misconduct,[84] the court considered the plaintiff's ordinary contributory negligence, with a finding that he had exercised ordinary care for his own safety.[85] By not rejecting the ordinary contributory negligence issue on the ground that it was not a defense to reckless misconduct, it appears extremely doubtful that the court did, in fact, intend to establish a standard of reckless misconduct.

The *Nabozny* language itself, therefore, does not provide a clear indication of the applicable standard of conduct. One commentator,[86] after engaging in an analysis of the *Nabozny* language much like the above, concluded that *Nabozny* expressed a standard of conduct which, in effect, combined the ordinary negligence standard with that of "reckless misconduct," creating an intermediary standard referred to as "excessive negligence."[87] An "excessive negligence" standard means, in effect, that a player who violates a rule of a game designed primarily to protect the safety of another player, and who violates that rule in a willful, wanton, or reckless manner, will be held liable in tort for injuries inflicted as a result of his actions.

> *Negligence and recklessness contrasted.* Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfullness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.

Id.

[83]W. PROSSER, *supra* note 82, § 34, at 184-85.

[84]RESTATEMENT (SECOND) OF TORTS § 503 (1965).

[85]31 Ill. App. 3d at 215-16, 334 N.E.2d at 261.

[86]53 CHI.-KENT L. REV. 97 (1976).

[87]*Id.* at 106.

The conclusion reached in the discussion above does justice to the considerations of policy expressed by the court in reaching its determination,[88] and is a step closer toward becoming the "carefully drawn . . . rule announced . . . in order to control a new field of personal injury litigation."[89]

The same result could be achieved, however, without resort to the creation of a new, independent, standard of negligence. If one considers ordinary negligence as requiring a showing of duty, breach, causation, and injury,[90] the excessive negligence standard is nothing more than an enhancement of the duty and breach which must be shown before recovery is permitted. As the activity and accompanying considerations of public policy change, so does the duty to which a participant in the activity is held and the nature of the conduct which would constitute a breach of that duty. For example, when the activity involved is driving an automobile, a primary consideration of public policy is to discourage those who are incompetent at that activity from participating in it. Thus, the definitions of "duty" and "breach," as applied to automobile driving, are justifiably designed to further the policy of discouraging the participation of incompetent drivers. When athletic activity is involved, however, a different public policy requires the application of other definitions of "duty" and "breach". In athletics, the public policy is to encourage incompetent participants to build their skills. The definitions of "duty" and "breach" must, therefore, further the policy of encouraging not only those who are competent, but those who are incompetent, to participate in the activity. The *Nabozny* court reached this result. *Nabozny* held that a participant in a contact sport has a duty to refrain from violating a rule of the game designed primarily to protect the safety of another player.[91] Because such violations would be common occurrences among both competent and incompetent participants, *Nabozny* also held that a breach of that duty does not occur unless the act is deliberate, willful, or with reckless disregard for the safety of another player.[92] The court further encouraged participation in athletics by applying the rule only if the participants have been trained and coached by knowledgable personnel, and the games are governed by recognized rules and safety standards.[93]

It thus appears that, despite the confusing language in *Nabozny*, the court enuciated nothing more than an ordinary negligence stan-

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[88]31 Ill. App. 3d at 215, 334 N.E.2d at 260.
[89]*Id.*, 334 N.E.2d at 261.
[90]W. PROSSER, *supra* note 82, § 30, at 143-44.
[91]31 Ill. App. 3d at 215, 334 N.E.2d at 260-61.
[92]*Id.*, 334 N.E.2d at 261.
[93]*Id.*, 334 N.E.2d at 260.

dard of conduct, narrowly tailored to further the policy considerations unique to the activity to which it is applied.

One final point contributing to the confusion in the *Nabozny* decision is the court's reference to the rules of the game,[94] particularly when dealing with the duty to which a participant in an organized athletic event will be held. The language used by the court might seem to support the argument that a violation of a safety rule would be the sole factor considered in determining liability.[95] It is well settled, however, that safety codes and other forms of objective standards which do not have the force of law, including safety rules in organized athletic events, have only functioned as evidence on the issue of negligence,[96] and should not be held as the sole standard of conduct. This conflict was resolved in *Stewart v. D & R Welding Supply Co.*,[97] decided two years after *Nabozny* by an Illinois appellate court. *Stewart* concerned a suit by a softball umpire against a player for injuries incurred between innings of a game. The injuries resulted from a three-pound weight that had flown off a bat, with which the defendant had been taking practice swings, and had struck the plaintiff. Both sides agreed that the duty of care owed by a player to an umpire during the course of a game was the same as that owed to another player.[98]

In *Stewart*, the defendant contended that *Nabozny* denied recovery for unintentional injuries incurred during the course of a game,[99] unless the injuries arose from the violation of a safety rule of that game. Since the defendant's actions did not violate a safety rule, he contended that his conduct gave rise to no liability.[100] The court dismissed this argument, stating: "[T]he liability of one participant to another is not limited to acts which are violations of safety

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[94]*Id.*, 334 N.E.2d at 260-61.

[95]The precise language used by the court was:

> [W]hen athletes are engaged in an athletic competition; all teams involved are trained and coached by knowledgeable personnel; a recognized set of rules governs the conduct of the competition; and a safety rule is contained therein which is primarily designed to protect players from serious injury, a player is then charged with a legal duty to every other player on the field to refrain from conduct proscribed by a safety rule.

Id.

[96]*See* W. PROSSER, *supra* note 82, § 36, at 201. *See also* Annot., 75 A.L.R.2d 778 (1961). In comparison, an unexcused violation of a statute is conclusive evidence of negligence, that is, negligence per se. W. PROSSER, *supra* note 82, § 36, at 200.

[97]51 Ill. App. 3d 597, 366 N.E.2d 1107 (1977).

[98]*Id.* at 598, 366 N.E.2d at 1108. *See* Annot., 10 A.L.R.3d 446 (1966); 65A C.J.S. *Negligence* § 174(b) (1966).

[99]In Mann v. Nutrilite, Inc., 136 Cal. App. 2d 729, 289 P.2d 282 (1955), the court expressed the opinion that the duty owed between participants is the same regardless of whether they are engaged in a game or warm-up. *Id.* at 733, 289 P.2d at 284.

[100]51 Ill. App. 3d at 598, 366 N.E.2d at 1108.

rules."[101] Instead, the court observed that "the total situation must be examined to determine whether the actor is blameless, negligence, or willful and wanton."[102] *Stewart* did not reject the *Nabozny* application of the role of the safety rules outright, but instead tried to distinguish that case upon its facts. The court said that while *Nabozny* apparently permitted recovery only if the conduct of the defendant constituted a violation of a safety rule, such a standard was appropriate in that instance because the relationship between opposing players in a game such as soccer, in which some contact is permitted, is different from that presented by an umpire in a softball game, in which no contact of the type complained of is permitted.[103]

It would seem that the *Stewart* court approached the problem from the wrong direction. Rather than determining the type of game involved *before* deciding the extent to which the safety rules should be considered, both factors, along with various other considerations, should be considered as a whole in determining the possible liability of a sports participant. If this interpretation were accepted, *Stewart* and *Nabozny* would be consistent with other cases dealing with an athlete's liability in negligence, as exemplified by *Niemczyk v. Burleson*,[104] which lists factors to be considered in determining the duty owed by a participant to his fellow participants:

> [T]he specific game involved, the ages and physical attributes of the participants, their relative skill at the game and their knowledge of its rules and customs, their status as amateurs or professionals, the type of risks which inhere in the game and those which are outside the realm of reasonable anticipation, the presence or absence of protective uniforms or equipment, the degree of zest with which the game is played, and doubtless others.[105]

While *Nabozny* represents a milestone in the study of unintentional injuries arising out of athletic events, the ambiguous language lends itself to interpretations contrary to those which appear to be more consistent with the existing case law and better suited to meet the various policy considerations involved.

The value of *Nabozny* can be likened to that of an icebreaker on its first passage through the frozen floes. While the path it cuts is narrow and treacherous, it has nonetheless left a path where one

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[101] *Id.* at 600, 366 N.E.2d at 1109.
[102] *Id.* at 601, 366 N.E.2d at 1110.
[103] *Id.* at 600, 366 N.E.2d at 1109.
[104] 538 S.W.2d 737 (Mo. Ct. App. 1976).
[105] *Id.* at 741-42. *See also* 53 CHI.-KENT L. REV. 97, 107 (1976).

had not existed before. Likewise, while rigid reliance on the ambiguous language in *Nabozny* may well lead to undesirable results; nevertheless, the case has "cut a path," providing a welcome framework for similar decisions by future courts. Just as subsequent ships must mark their courses carefully, so should future courts take care to avoid the ambiguities of *Nabozny*, basing their holdings instead on precisely defined standards of conduct.

D. The Current Status of Recovery for Injuries Sustained in a Contact Sport: The Rule as Applied to the Professional Athlete

In *Hackbart v. Cincinnati Bengals, Inc.*,[106] the United States Court of Appeals for the Tenth Circuit announced the beginning of another new chapter in sports litigation by holding that the principles of tort law are applicable to the case of a professional athlete injured during the course of a contest.[107]

1. Facts of the Case.—Hackbart was an appeal of a judgment entered by the United States District Court for the District of Colorado for the defendants. The incident giving rise to the action occurred in the course of a professional football game. Named as co-defendant was Charles "Bobby" Clark, who was, at the time of the incident, a rookie fullback. Plaintiff, Dale Hackbart, was a thirteen-year veteran of the National Football League, playing the position of free safety. The incident which gave rise to the lawsuit occurred near the end of the first half of play when defendant-team had attempted a forward pass play during which Clark had run into an area that was the defensive responsibility of plaintiff. The pass had been intercepted by one of plaintiff's teammates, who had then begun to run the ball back upfield. "Acting out of anger and frustration, but without a specific intent to injure,"[108] defendant had stepped forward and struck a blow with his right forearm to the back of plaintiff's head while plaintiff was in a kneeling position watching the play continue upfield. The blow allegedly resulted in injuries for which plaintiff sought recovery.[109]

2. Decision of the District Court.—The court, sitting without a jury and confined to the question of liability, ruled that: "The claim of the plaintiff . . . must be considered in the context of football as a commercial enterprise,"[110] the National Football League having been formed for the purpose of "promoting and fostering the business of

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[106]No. 77-1812 (10th Cir. June 11, 1979).

[107]*Id.*, slip op. at 14a.

[108]*Id.*, slip op. at 3.

[109]*Id.*

[110]435 F. Supp. 352, 354 (D. Colo. 1977).

its members, the owners of professional football 'clubs' with franchises to operate in designated cities."[111] In addition, the court discussed the aspects of the game itself, stating: "The most obvious characteristics of [the game] is that all of the players engage in violent physical behavior."[112] Moreover, it was deemed that disabling injuries were common occurrences in each contest; professional football players were conditioned, and expected to perform even though they were hurt; and that participants were extremely aggressive in their actions, playing with a reckless abandonment of self-protective instincts.[113] After describing the emotional level of a professional football player at game-time as a "controlled rage,"[114] the court stated: "Quick changes in the fortunes of the teams, the shock of violent collisions and the intensity of the competition make behavioral control extremely difficult, and it is not uncommon for players to 'flare up' and begin fighting."[115]

With this discussion in mind, the court considered the plaintiff's contentions of the defendant's recklessness[116] and negligence. Declaring these two terms different only in degree, the court went on to state: "Both theories are dependent upon a definition of a duty to the plaintiff and an objective standard of conduct based upon the hypothetical reasonably prudent person."[117] The court then noted:

> It is wholly incongruous to talk about a professional football player's duty of care for the safety of opposing players when he has been trained and motivated to be heedless of injury to himself. The character of NFL competition negates any notion that the playing conduct can be circumscribed by any standard of reasonableness.[118]

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[111] *Id.*

[112] *Id.*

[113] *Id.* at 355.

[114] The court stated:

> John Ralston, the 1973 Broncos coach, testified that the pre-game psychological preparation should be designed to generate an emotion equivalent to that which would be experienced by a father whose family had been endangered by another driver who had attempted to force the family car off the edge of a mountain road. The precise pitch of motivation for the players at the beginning of the game should be the feeling of that father when, after overtaking and stopping the offending vehicle, he is about to open the door to take revenge upon the person of the other driver.

Id.

[115] *Id.*

[116] The court defined "reckless misconduct" as that within the principles of the RESTATEMENT (SECOND) OF TORTS § 500 (1965). It is interesting to note that the court cited *Nabozny*, perhaps incorrectly, *see* text accompanying notes 82-85 *supra*, as a case illustrative of a recovery based upon reckless misconduct. 435 F. Supp. at 355.

[117] 435 F. Supp. at 355.

[118] *Id.* at 356. The court incorrectly stated that the theory of "reckless misconduct," as defined by the RESTATEMENT (SECOND) OF TORTS § 500 (1965), was subject to the

Even if a duty to the plaintiff were breached, the court concluded:

> Upon all of the evidence, my finding is that the level of violence and the frequency of emotional outbursts in NFL football games are such that [the plaintiff] must have recognized and accepted the risk that he would be injured by such an act as that committed by the defendant . . . . Accordingly, the plaintiff must be held to have assumed the risk of such an occurrence.[119]

Having already stated that the plaintiff's action was, effectively, barred by the assumption of risk defense, the court then considered the applicability of tort principles to professional football. In this discussion the court asked: "What is the interest of the larger community in limiting the violence of professional football?"[120] Choosing not to answer, the court instead asked yet another question, to which it provided a telling response: "Can the courts answer this question? I think not."[121] In effect, the court not only denied recovery to plaintiff in this action, but also stated that future plaintiffs, under similar facts and circumstances, could not obtain relief in the courts unless the legislature acted first; that is to say, the principles of tort law do not apply to professional football unless through legislative action.[122]

3. Decision of the Court of Appeals.—On appeal, the Tenth Circuit was faced with a lower court determination that, in effect, closed the judiciary to professional athletes seeking redress for injuries received during the course of a game. The appellate court said that the justification for the trial court rejection of the claim was based upon the rationale that the extremely violent nature of professional football rendered injuries sustained not actionable, even to the extent that intentional batteries were beyond the scope of the judicial process.[123] By holding that the trial court judgment was not supported by the evidence,[124] the court of appeals re-opened the judicial

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defense of contributory negligence. The RESTATEMENT (SECOND) OF TORTS § 503(1) (1965), states: "A plaintiff's contributory negligence does not bar recovery for harm caused by the defendant's reckless disregard for the plaintiff's safety." *Id.*

The plaintiff submitted several alternative theories of liability, all of which were rejected by the court. In addition, the plaintiff was barred by the applicable statute of limitations from asserting a theory of intentional misconduct. 435 F. Supp. at 355.

[119]435 F. Supp. at 356.

[120]*Id.* at 357.

[121]*Id.*

[122]*Id.* at 357-58. "My conclusion that the civil courts cannot be expected to control the violence in professional football is limited by the facts of the case before me." *Id.* at 358. The district court's holding has been the subject of intense criticism. *See* 57 NEB. L. REV. 1128 (1978); 12 GA. L. REV. 380 (1978).

[123]No. 77-1812, slip op. at 2.

[124]*Id.*, slip op. at 6.

process to the professional athlete seeking redress for injuries sustained at the hands of an opposing player.

The question before the circuit court was "whether in a regular season professional football game an injury which is inflicted by one professional football player on an opposing player can give rise to liability in tort where the injury was inflicted by the intentional striking of a blow during the game."[125] In reaching its determination, the court considered first whether the rules or customs of the game gave any legal justification for the trial court's answer that the conduct in question was not subject to the constraints of tort law. Finding that neither the game rules,[126] nor the customs of the game, permitted or condoned the type of conduct exhibited by the defendant, the court concluded: "[C]ontrary to the position of the [trial] court then, there are no principles of law which allow a court to rule out certain tortious conduct by reason of general roughness of the game or difficulty of administering it."[127]

Next, and of greatest concern to the court, was the trial court's conclusion that the constraints of public policy dictated that the defendant's conduct, because it occurred in the course of a professional football game, should not be subject to the restraints of the law unless the legislature provided recourse to the injured professional athlete.[128] The court considered this to be a refusal by the district court to try the case on its merits merely because pressures of public policy and the nature of activity involved made resolution of the issues difficult, to which the circuit court said:

> [T]here exists not an independent basis which allows a federal court to, in effect, outlaw a particular activity absent legal evidence that either state policy or state law dictates or allows such action. Absent any such evidence, the trial court cannot turn to public policy in order to support a conclusion that the courts cannot entertain a particular case.[129]

Finding that neither federal nor state law or practice permitted the trial court to refrain from hearing the case on its merits, the court held that to rule that the case had to be dismissed because the injury was inflicted during a professional football game was error.[130]

Finally, having held that redress was available to the injured

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[125]*Id.*, slip op. at 1.

[126]"A player may not strike with the fists, kick, knee, or strike on the head, neck or face with the heel, back, or side of the hand, wrist, forearm, elbow, or clasped hands." NATIONAL FOOTBALL LEAGUE PROPERTIES, INC., THE NFL'S OFFICIAL ENCYCLOPEDIC HISTORY OF PROFESSIONAL FOOTBALL 468 (1977).

[127]No. 77-1812, slip op. at 7.

[128]*Id.*, slip op. at 9.

[129]*Id.*, slip op. at 12-13.

[130]*Id.*, slip op. at 14a.

professional athlete in the federal courts, the court turned its attention to the standard of conduct to be applied to the defendant's acts. The court determined that the standard of "reckless misconduct," as defined by the *Restatement (Second) of Torts*[131] was fully applicable and that the plaintiff had the right to offer proof of reckless misconduct.[132] The court reached this determination in response to the defendant's argument that if he were guilty of anything at all, it was assault and battery, with that action being barred by a one year statute of limitations.[133] In finding that sufficient evidence existed to support recovery under the reckless misconduct theory, the court used a six year statute of limitations which is applicable in cases involving the reckless disregard of the rights of a plaintiff.[134] The effect of this determination was not to prejudge the defendant's liability, but to consider the evidence in the light most favorable to the appellant in determining the applicable statute of limitations,[135] thus providing the procedure by which plaintiff would have his claim heard.

4. Analysis and Application.—The decision of the court of appeals in *Hackbart*, reversing the judgment of the district court, is a step forward. This statement necessarily implies the belief that the district court's holding was a significant step backward in the field of sports litigation.

The district court would have, effectively, closed the courts to the professional athlete seeking redress for injuries sustained during the course of a contest and caused by a fellow participant. This would have resulted from the trial court's holding that the legislature, and not the courts, must provide the mechanism by which a professional athlete, injured at the hands of an opposing player, might obtain redress;[136] and that a professional athlete assumes the risk of injuries resulting from flagrant violations by fellow participants of the safety rules of the game.[137] The court of appeals responded clearly to only the first of the two issues raised above, holding, in effect, that the court must try the claim on its merits, and that it was error to dismiss the suit merely because it arose out of a professional football game.[138] What remains, therefore, is the district court's holding that a professional athlete assumes the risk of injuries resulting from flagrant violations by fellow participants of the safety rules.

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[131]RESTATEMENT (SECOND) OF TORTS § 500 (1965).
[132]No. 77-1812, slip op. at 18.
[133]*Id.*, slip op. at 17.
[134]*Id.*, slip op. at 17-18.
[135]*Id.*, slip op. at 18.
[136]435 F. Supp. at 357-58.
[137]*Id.* at 356.
[138]No. 77-1812, slip op. at 14a.

The court of appeals, interestingly, treated that portion of the district court decision dealing with assumption of risk as dicta, despite the following language from the district court opinion: "Accordingly, the plaintiff must be held to have assumed the risk of such an occurrence."[139] Even so, the court of appeals provided some insight into the proper resolution of this issue through *its* dicta regarding the applicability of the consent defense. The court stated: "[I]t is highly questionable whether a professional football player consents or submits to injuries caused by conduct not within the rules, and there is no evidence which we have seen which shows that. However, the trial court did not answer this question and we are not deciding it."[140]

By not deciding the issue, the court has left open one of the most serious problems raised by the district court. The conduct exhibited by the defendant in *Hackbart* was such a flagrant violation of a safety rule of the game that it cannot reasonably be characterized as a risk incidental to the activity, and must be considered as outside the realm of the assumption of risk defense. By denying recovery for even a flagrant violation of the sport's safety rules, the district court, in effect, would have rendered those rules void. The court of appeals, while not finally resolving these problems, has nonetheless indicated what the correct response should be, and, thus, is a positive step.

The decision of the court of appeals contains one additional bit of significant dicta. While being careful to point out that it was not prejudging the issue,[141] the court made it apparent that the standard of conduct to be applied to this case was "reckless misconduct,"[142] as defined by the *Restatement (Second) of Torts*.[143] The court made it equally clear that ordinary negligence was inapplicable, for as the court stated, "subjecting another to unreasonable risk of harm, the essence of negligence, is inherent in the game of football, for admittedly it is violent."[144] It appears, therefore, that the court would apply no standard less stringent than reckless misconduct to claims arising out of injuries in professional contact sports.

The applications of *Hackbart* to *Nabozny* are, at best, limited. Both cases discussed extensively the considerations of public policy involved in each of the activities in question. The district court in *Hackbart*, however, considered the public policy to be something quite different from that set forth at the outset of this Note, ignoring

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[139]435 F. Supp. at 356.

[140]No. 77-1812, slip op. at 7.

[141]*Id.*, slip op. at 18.

[142]*Id.*, slip op. at 15-16.

[143]RESTATEMENT (SECOND) OF TORTS § 500 (1965).

[144]No. 77-1812, slip op. at 7.

the widespread public sentiment demanding that something be done about the epidemic status of sports-related injuries and violence. The district court's determination that public policy precluded a tort action arising from a professional football game was used as justification for refusing to try this type of case, an erroneous holding under the decision of the court of appeals. The appellate court indicated the proper role of game rules in determining liability, but the similarity to *Nabozny* ends there. *Hackbart* involved a factual situation much different from that of *Nabozny*, and as such each case must announce a rule applicable to its own facts: *Hackbart* to professional athletics, and *Nabozny* to amateur athletics.

Hackbart, despite the narrow basis of its holding, has made a significant contribution to the field of sports litigation by opening the doors of the courts to the professional athelte injured at the hands of another participant during the course of a contact sport, and has re-established the threat of tort liability as the impetus for promoting a more effective means of self-regulation on the part of professional contact sports. While *Hackbart* is significant in its dicta, it remains to the wisdom of future courts to apply these statements in a manner beneficial to the athletes, and thus to organized athletics.

III. Conclusion

The key to understanding the state of the law regarding the liability of a participant in an athletic event for injuries he inflicts upon another participant is to understand the considerations of public policy inherent in cases such as these. The dogma that athletics should be free from judicial interference no longer controls. Instead, new thought has arisen that while courts should exercise great caution not to restrict free and active participation in sports, the world of athletics is no longer immune from legal review. Of the various factors giving rise to this change in philosophy, perhaps the single most important is the public sentiment that athletics are not longer capable of policing themselves, as evidenced by the alarming increase in sports-related injuries.

Injured athletes are now finding recourse available to them in areas once considered "out of the question."[145] Professional athletes have now been given legal redress for injuries sustained during the course of a game at the hands of other participants. However, clear standards regarding the professional athlete have yet to be articulated. Thus, the most significant holding at this time is that announced in *Nabozny*, stating that recovery is now available in amateur contact sports against fellow participants whose noninten-

[145] 26 Mich. L. Rev. 322, 322 (1927).

tional acts result in injury. Reflecting the influence of the policy considerations involved—particularly the desire to continue to promote the free and active participation in athletics, the rule behind the *Nabozny* holding is a narrow one, stating that only in situations in which knowledgable personnel coach participants and a set of "rules" governs the play and promotes the safety of the game will a participant be found liable in negligence for injuries caused to another participant, and then only if the player's actions constitute a deliberate, willful or reckless disregard for such "rules."

As public sentiment continues to change, organized athletics will either become internally responsible or face continued interventions by the judiciary. At the same time, courts must be extremely careful in their holdings to assure that free participation in sports is not discouraged or abridged.

As it now stands, the rule governing a participant's liability to a fellow participant for injuries resulting from a nonintentional act has provided the framework for a new field of personal injury litigation. While beset with problems of interpretation, the rule's potential for benefit to injured athletes, and thus to organized athletics, is sufficient to warrant continued and expanded application of the rule.

CHARLES E. SPEVACEK

Keeping Third Parties Minor: Political Party Access to Broadcasting

I. Introduction

Since 1864, politics in the United States has been dominated by a two-party system comprised of Republicans and Democrats. Third parties, however, have raised new issues many of which have been adopted later by the major parties and have become enshrined in law. With the increased use of expensive radio and television time in political campaigns in recent years, federal statutory law and court opinions about access to the airwaves have been crucial for minor third parties in their efforts to reach the electorate.[1]

The "equal time" provision of the Communications Act of 1934,[2] the Federal Election Campaign Act of 1971,[3] and the United States Supreme Court decision in *Buckley v. Valeo*[4] have all served to further entrench established political parties at the expense of third parties.

Practical solutions, which Congress might study, do exist to remedy the discriminatory effects of these communications and campaign laws. The recent reliance upon television advertising as the major method of political campaigning will continue to endanger the important role customarily played by third parties in American political history unless ameliorative action is soon taken.

II. Third Parties in United States History

From 1787 to 1856, various political parties arose and

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[1]These parties have been called "minority" or "minor" or "third" parties to distinguish them from the Democratic and Republican parties; these terms are used interchangeably.

[2]47 U.S.C. § 315(a) (1976). While § 315(a) is the provision specifically creating the "equal time" doctrine, all of § 315 regulates matters of political broadcasts. In particular, § 315(b) establishes guidelines for the rates which may be charged to candidates seeking to obtain air time or attempting to enforce their equal time privilege.

[3]Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified in scattered sections of 2, 18, 47 U.S.C. (1976)), *as amended by* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified in scattered sections of 2, 5, 18, 26, 47 U.S.C. (1976)), and *as amended by* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (codified in scattered sections of 2, 26 U.S.C. (1976)) [hereinafter cited as Federal Election Campaign Act of 1971 *as amended*]. Also included in the scheme of campaign financing and regulation is Subtitle H of the Internal Revenue Code. The Revenue Act of 1971, Pub. L. No. 92-178, §§ 801-802, 85 Stat. 497 (now I.R.C. §§ 9001-9013). This subtitle consists of two parts: Chapter 95 deals with funding national party conventions and general election campaigns for President, and Chapter 96 deals with matching funds for presidential primary campaigns.

[4]424 U.S. 1 (1976).

declined—the Federalist, National Republican (Whig), Anti-Mason, American (Know-Nothing), and Free Soil parties. The Democratic-Republican party endured this period and today is known as the Democratic party. The Republicans, whose party was founded in 1854, captured the presidency a mere six years later and have continued since then as a major party.

Although other political parties in the twentieth century have slated candidates for elective office and have presented ideas, some of which have become embodied in law, none of them have dislodged or even seriously contested the political control of the major parties for more than a brief time.[5]

Early in the twentieth century, the Socialist party increased its strength yearly, winning races for 1,200 offices throughout the United States in 1912.[6] The party's opposition to World War I, however, was a major factor in its subsequent decline. Its six percent share of the presidential vote in 1912 dropped in half in the following two elections and declined precipitously thereafter.[7]

Differences over policies and personalities created splits in the Republican party in 1912 and in 1924, producing significant third-party movements in those years' presidential contests. In 1912, former President Theodore Roosevelt led the Progressive (Bull Moose) ticket, out-polling the Republican nominee, incumbent President William Howard Taft. Progressives of both major parties, socialists, labor unionists, and isolationists joined together in 1924 to support the candidacy of Wisconsin Senator Robert A. La Follette. That campaign attracted nearly 5,000,000 votes,[8] which constituted almost seventeen percent of the total number cast.[9]

South Carolina Governor J. Strom Thurmond of the States' Rights (Dixiecrat) party and former Vice-President Henry A. Wallace of the Progressive party each received about 1,100,000 of the votes case for President in 1948.[10] More recently, Alabama Governor George C. Wallace received over 10,000,000 votes, or fourteen percent of the total vote, in 1968 when he was the presidential candidate of the American Independent party.[11]

Since the beginning of the twentieth century, numerous candidates have appeared on the ballot for the presidency. In the 1976

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[5]For a discussion of third parties in United States history and their significance, *see generally* W. HESSELTINE, THE RISE AND FALL OF THIRD PARTIES (1957); D. MAZMANIAN, THIRD PARTIES IN PRESIDENTIAL ELECTIONS (1974).

[6]J. WEINSTEIN, THE DECLINE OF SOCIALISM IN AMERICA 1912-1925, at 27 (1967).

[7]W. HESSELTINE, *supra* note 5, at 38-39.

[8]*Id.* at 27, 33.

[9]D. MAZMANIAN, *supra* note 5, at 5.

[10]U.S. DEPT. OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, pt. 2, at 1073 (1975).

[11]*Id.*

election, there were about a dozen minor party candidates. Of these candidates, Roger McBride of the Libertarian party and former Senator Eugene McCarthy, who ran as an independent, appeared on state ballots for President the most frequently. Neither McBride nor McCarthy was on the ballot in Indiana, but three other minor party candidates were, each of whom received insignificant numbers of votes.[12]

Third-party and independent candidates seek other offices. A former Governor of Maine, James B. Longley (1975-79), and one of Virginia's current Senators, Harry Flood Byrd, Jr., both ran as independents against candidates of the major parties and defeated them.

In addition to attempting to gain power, minor parties have served various functions in American politics, including encouraging various disaffected citizens to participate in the electoral process. A major function served by minor parties has been the elevation of new and controversial issues to prominent public debate.[13] Throughout United States history, third parties have championed views that later became embodied in the programs of major parties and then enacted into law. The Anti-Masonic party of the 1820's and 1830's opposed secrecy in government and secret societies such as the Masons and Phi Beta Kappa.[14] In 1832, the Anti-Masons held the first national convention to nominate a presidential candidate; the Whigs and the Democrats soon imitated this practice.[15] While there may have later developed various defects in the convention system,

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[12]The minor party candidates for President in 1976 in Indiana ran on the tickets of the U.S. Labor, Socialist Workers', and American parties.

[13]Chief Justice Warren described this value of minor parties in Sweezy v. New Hampshire, 354 U.S. 234 (1957):

> All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. . . . The absence of such voices would be a symptom of grave illness in our society.

Id. at 250-51. In *Sweezy*, petitioner had been found guilty of refusing to answer questions asked him by the New Hampshire Attorney General, pursuant to a legislative resolution directing the officer to determine if there were "subversive persons" in the state and to suggest legislation regarding the subject. Sweezy had refused to respond to inquiries about the content of a lecture he had given at the University of New Hampshire and to indicate the extent of his knowledge regarding the state's Progressive party and its members. The United States Supreme Court reversed the conviction for contempt because of violations of the due process clause of the fourteenth amendment. *Id.*

[14]W. HESSELTINE, *supra* note 5, at 11.

[15]*Id.*

conventions were significantly more democratic than the previously used caucus system of nomination.[16]

The Free Soil party forced candidates in the 1848 presidential election to debate the restriction of slavery, the demand for which became a key Republican issue a decade later.[17] Progressive income taxation, regulation of railroads, child labor laws, postal savings banks, and social insurance were ideas first raised politically by Socialists, Farmer-Laborites, Progressives, and Populists at the end of the nineteenth and the beginning of the twentieth centuries.[18] Other issues first raised politically by these minor parties included direct election of United States Senators, women's suffrage, primary elections, recall, and referendum—most of which were adopted nationally or in numerous states early in the twentieth century. By raising the issue of "busing" to a national level, the American Independent party of 1968 directly contributed to the adoption of busing policies by the two major parties.[19]

While these minor parties did not achieve significant political power, they did serve important functions in raising issues, some of which were enacted into law. One observer stated: "If those who are in favor of a new party are content to remain missionaries, they might find much comfort in the record of achievement of the nineteenth century's third parties."[20]

III. Minority Parties and Broadcasting: The Critical Problem

The critical problem concerning minority parties' access to broadcasting involves assuring the widest possible exposure to divergent political views without overburdening the airwaves. Wide exposure leads to an informed electorate, upon which the proper functioning of a democracy rests. In 1968 the United States Supreme Court stated in *Williams v. Rhodes*:[21] "There is, of course,

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[16] *Id.*

[17] D. Mazmanian, *supra* note 5, at 67.

[18] *Id.* at 81-82. Most of these reforms were proposed by more than one of the minor parties mentioned.

[19] *Id.* at 85-87.

[20] W. Hesseltine, *supra* note 5, at 18.

[21] 393 U.S. 23 (1968). *Williams* involved an attack by the candidates for United States President of the Ohio American Independent and Socialist Labor parties on the state of Ohio's requirements for minor parties to achieve ballot status. Pursuant to Ohio law, a party other than the Democratic or Republican parties had to obtain petitions with signatures of 15% of the number of voters in the last gubernatorial election and file the petitions nine months before the general election. In affirming the lower federal court's ruling that the law was unconstitutional, the United States Supreme Court held that the parties were entitled to have their candidates legally qualified for

no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms."[22]

Federal regulation of broadcasting is based on the concept that the airwaves belong to the public. As a result, stations must serve the "public interest, convenience, and necessity."[23] These factors distinguish broadcast media from print media, which cannot be required, by virtue of the first amendment, to inform the electorate by presenting the views of all candidates for office.[24]

A. Regulation of Political Broadcasts: Congressional Intent

Section 315 of the Communications Act of 1934 continued without significant change the provisions of section 18 of the Radio Act of 1927.[25] The legislative intent behind both sections of these acts is uncertain due to limited congressional discussion of their provisions, but it is clear that they were designed to prohibit the monopolization of the airwaves by one candidate. No direct reference to third parties appears in the congressional debates on either section. Section 315, however, was debated less than two years after a significant third-party presidential campaign by La Follette, during which several radio stations censored his speeches.

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the election without meeting requirements of the Ohio law. The lower court decision was modified to allow the American Independent party to be listed on the Ohio ballot. *Id.* at 35. The Socialist Labor party was not placed on the ballot because its request to the Court came after the ballots had been printed, while that of the American Independent party came before the printing and thus did not involve disruption to the election. For further discussion of *Williams*, see 21 U. FLA. L. REV. 701 (1969).

[22]393 U.S. at 32.

[23]This phrase appears several times in the Communications Act of 1934, codified in scattered sections of 47 U.S.C. (1976), and is central to the mission of the Federal Communications Commission.

[24]For opinions of the United States Supreme Court discussing the different applications of the first amendment to print and broadcast media, see Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). In *Columbia Broadcasting*, the Court indicated:

> [T]he broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated. The Court spoke to this reality when, in *Red Lion*, we said "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."

412 U.S. at 101 (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. at 388).

[25]Radio Act of 1927, ch. 169, § 18, 44 Stat. 1162.

The candidate charged that monopoly interests in broadcasting had conspired to restrict his access to the electorate.[26]

Section 315(a) of the Communications Act of 1934 provides: "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station."[27]

In the Senate debate on the Radio Act, Senator Howell of Nebraska explained the rationale underlying this particular provision:

> We are all familiar with the results of propaganda, its dangers and its advantages; and the question which we are called upon to settle now is how the public may enjoy the advantages of broadcasting and avoid the dangers that may result therefrom.
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> . . . .
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> . . . Are we to consent to the building up of a great publicity vehicle and allow it to be controlled by a few men, and empower those few men to determine what the public shall hear?
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> . . . .
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> Mr. President, if all candidates can not be heard, none should be heard. If both sides of a question can not be heard over a particular radio station, none should be heard. . . . Are we going to allow these great interests to utilize their stations to disseminate the kind of publicity only of which they approve and leave no opportunity for the other side of public questions to reach the same audience?[28]

Section 315 was introduced by Senator Dill of Washington, whose colloquy with Senator Cummins of Iowa implies that the section was not meant to be limited to the two major parties:

> Mr. Cummins: Of course, the Senator understands that the effect of the amendment now offered is to deny to all candidates the use of the broadcasting station.
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> Mr. Dill: Unless it permits one candidate to use it.
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> Mr. Cummins: But the Senator knows that if it permits one there will be enough others to insist upon the use of the service to take up all the time of the broadcasting stations.

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[26]E. CHESTER, RADIO, TELEVISION AND AMERICAN POLITICS 19 (1969). For a discussion of the legislative history of § 315, see Flory v. FCC, 528 F.2d 124, 128-29 (7th Cir. 1975); Paulsen v. FCC, 491 F.2d 887, 889 (9th Cir. 1974); Felix v. Westinghouse Radio Stations, Inc., 186 F.2d 1 (3d Cir. 1950), *cert. denied*, 341 U.S. 909 (1951); Singer, *The FCC and Equal Time: Never-Neverland Revisited*, 26 MD. L. REV. 221 (1967).

[27]47 U.S.C. § 315(a) (1976).

[28]67 CONG. REC. 12503-04 (1926).

> Mr. Dill: I will say to the Senator that at present they are not required to allow anybody to speak over the radio. Under the House bill they can allow one man to speak and forbid everybody else to speak. . . . If a station permitted a candidate for Congress to broadcast, then other candidates for Congress should have an equal right.[29]

There have been three changes in the application of section 315 since its enactment. The first was the 1959 amendment in response to the Federal Communications Commission (FCC) decision in the Lar Daly case,[30] which indicated that the requirement of "equal opportunities" applied regardless of the context in which the initial candidate appeared on the radio or television station.

Daly was a minor party candidate for mayor of Chicago. He demanded equal time on Chicago television stations when the stations' news programs covered the pre-election activities of the incumbent Mayor Richard J. Daley. The FCC held that Daly had a right to television coverage equal to that afforded to Daley.[31]

The FCC decision may have been inconsistent with the congressional intent in enacting section 315 and with broadcasting practice prior to 1959.[32] In the 1959 amendment, Congress exempted from the

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[29]*Id.* at 12502.

[30]Columbia Broadcasting Sys., Inc., 18 RAD. REG. (P & F) 238, *aff'd*, 26 F.C.C. 715, 18 RAD. REG. (P & F) 701 (1959).

[31]*Id.*

[32]In debate on the Radio Act, Senators Fess and Dill discussed whether the equal opportunities provision would apply to a candidate making a speech or other remarks not connected with his campaign for office. Although Fess thought that the provision would be applied, Dill believed that the intention of his amendment was to leave such matters to the rule-making powers of the Federal Radio Commission (predecessor agency to the FCC) and that it was not his intent to have the section apply under such circumstances. 67 CONG. REC. 12503 (1926). When the FCC 30 years later ruled that the section was applicable under such circumstances, in the Lar Daly case, the Congress quickly amended the section. Act of Sept. 14, 1959, Pub. L. No. 86-274, 73 Stat. 557. Former Senator Dill appeared before the Senate committee considering passage of legislation to overturn the FCC decision and answered questions of Senator John Pastore of Rhode Island:

> Pastore: Mr. Dill, when you chose the word "use" that appears in section 315, . . . did you mean that the candidate was responsible for initiating the broadcast?
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> Dill: Yes. That was the thought.
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> Pastore: In other words the mere fact that a station would, on its own, decide to take a picture at a given time of an event which they considered to be newsworthy, was that in your judgment a use being made by the candidate?
>
> Dill: Not at all. . . . And as a candidate myself in those days I was anxious to put out such publicity as would get into the news on the radio, but it was never considered to be use of the radio as intended by the law. . . . No; the term "use" was intended to be a use initiated by the candidate. No doubt about that. Nobody had any other thought.

"equal opportunities" requirement of section 315 appearances of candidates on any bona fide newscast, bona fide news interview, bona fide news documentary, or on-the-spot coverage of bona fide news events.[33]

In 1960, a law suspended the application of the section to the races for President and Vice-President.[34] The exemption allowed John F. Kennedy and Richard Nixon to meet in three radio and television debates without similar broadcast access being provided to candidates of minor parties.

Finally, a 1971 statute amending section 312(a)(7) of the Communications Act of 1934[35] required stations to "allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."[36] Thus, in effect, section 315 requires that time be made available only to candidates for federal office. There is no requirement that time be made available to candidates for state or local office; the broadcast stations are allowed to exercise their discretion in selling air time to them. Whether time is purchased by candidates for state and local office or by candidates for federal office, any appearance by a candidate entitles all other candidates for the same office to have an equal opportunity to use broadcast time on that station under terms and conditions similar to the initial use. The exception to this equal opportunities requirement arises when an appearance is classified as

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Political Broadcasting: Hearings on S. 1585, S. 1604, S. 1858, and S. 1929 Before the Subcomm. on Communications Of the Senate Comm. on Interstate and Foreign Commerce, 86th Cong., 1st Sess. 113 (1959) [hereinafter cited as *Political Broadcasting*]. Frank Stanton of the Columbia Broadcasting System (CBS) testified that his network had believed that § 315(a) did not apply to newscasts. *Id.* at 103-04. Two years before issuing the Lar Daly decision, the FCC had interpreted § 315(a) as not applying to routine newscasts. Allen H. Blondy, 40 F.C.C. 284, 285 (1957). When Allen Blondy objected that an opponent in a judicial election had appeared on a television news program showing a group of judges being sworn into office, the FCC found that the opponent's picture and the newscaster's accompanying comments describing the event did not constitute a "use" under § 315(a). The FCC held:

> WWJ-TV did not "permit . . . [a] legally qualified candidate for . . . public office to use a broadcasting station" by showing and referring to Mr. Davenport [the opponent] in its routine newscasts in the manner indicated. Therefore, it is under no obligation to ". . . afford equal opportunity to all other" candidates for the office for which Mr. Davenport has filed.

Id.

[33]Act of Sept. 14, 1959, Pub. L. No. 86-274, 73 Stat. 557 (codified at 47 U.S.C. § 315(a) (1976)).

[34]Act of Aug. 24, 1960, Pub. L. No. 86-677, 74 Stat. 554.

[35]Federal Election Campaign Act of 1971, Pub. L. No. 92-255, § 103, 86 Stat. 3 (1972) (codified at 47 U.S.C. § 312(a)(7) (1976)).

[36]*Id.*

occurring on a bona fide news program. In addition, stations are required to charge their lowest unit rate for any broadcasting time purchased by a candidate within forty-five days before a primary election and sixty days before a general election.[37]

B. Barriers to Equal Opportunities

There remain several barriers preventing third parties from receiving exposure on the airwaves equal to that of the major parties. Most significant is the cost of advertising, particularly on television and in the larger broadcasting markets.[38] Second is the lack of any requirement that broadcasters donate "sustaining" (free) time to the views of candidates for political office. Third is the effect of the 1959 amendments to section 315. Fourth is the Federal Election Campaign Act of 1971, as amended in 1974 and 1976,[39] which was upheld by the United States Supreme Court in *Buckley v. Valeo*.[40]

1. Costs.—Minor parties face significant obstacles in their attempt to acquaint the public with their analyses and programs. Today, television is the major source of public information about most issues and candidates. Increased costs of political broadcasting hinder all candidates from reaching the public but especially burden minor parties because of their usual lack of financial resources.

The cost to all candidates for political broadcasting advertisements (television and radio) rose from less than $10,000,000 in 1956 to more than $24,000,000 in 1964 and to over $40,000,000 in 1968.[41] This increase in costs took place over a period of time during which the total cost of campaigns only doubled[42] while, at the same

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[37]47 U.S.C. § 315(b) (1976).

[38]In 1968, the cost of a one-minute spot for a political candidate on a network, in prime time, during the fall election was almost $50,000, not including the cost of producing the spot. Wick, *The Federal Election Campaign Act of 1971 and Political Broadcasting Reform*, 22 DEPAUL L. REV. 582, 584, n.10 (1973). The cost of such advertisements presumably has risen sharply since that time. One of the television network station affiliates in Indianapolis indicated its prices for political advertisements, which were sold only in half-minute spots: a political advertisement during the 1976 campaign cost from $20 to $70 during most of the day, $175 to $500 during a sports broadcast, and $800 to $1200 in prime time. These figures were claimed to be competitive with the other network affiliates in the city. Interview with Beth Sullivan of WTHR (Channel 13), in Indianapolis (July 15, 1977). For radio, advertising rates are much less expensive; for example, one of the most popular Indianapolis AM stations charged between $15 and $50 for a minute spot political advertisement during the 1976 election campaign. Interview with Ray Cooper of WIBC (1070), in Indianapolis (July 7, 1977).

[39]Federal Election Campaign Act of 1971 *as amended*, *supra* note 3.

[40]424 U.S. 1 (1976).

[41]Freeman & Edelstein, *Political Campaigning and the Airwaves*, 1 PEPPERDINE L. REV. 178, 187-88 (1974).

[42]*Id.*

time, the rate of inflation increased but twenty-eight percent.[43] The spending restrictions of the Federal Election Campaign Act Amendments of 1974 may end the continuing increase in broadcast costs, although the law applies only to federal offices.[44]

Campaign broadcast expenditures in recent years have consumed an increasing percentage of the funds spent by candidates seeking office, which attests to the politicians' belief that such advertising is effective. Although there are some exceptions, there is a strong correlation between the size of overall campaign expenditures and the success of candidates running for election in states with meaningful party contests.[45]

The requirement for equal treatment in broadcasting for all candidates does little to assure equality in fact because the real test of a candidate's ability to achieve significant exposure to the electorate is measured by the size of the candidate's campaign chest.[46] If one candidate for an office purchases $1,000 in advertising on a particular broadcast outlet, federal law requires only that opponents in the same election be allowed to purchase a similar amount of broadcast time under the same conditions.[47] If the opponents lack the funds to purchase the broadcast time, then the requirement of equal access has been of no benefit to them since the first candidate has been the only one to obtain exposure to the voters through the particular station. One major party candidate commonly has far more funds than the other major party candidate. The disparity in financial resources is usually much greater for the minor party candidates.

With a few exceptions, such as the Wallace campaign of 1968, minority parties generally have limited funding. Another problem for most minor parties is that the public is not aware of their goals and their candidates; without the ability to receive significant coverage by broadcasters, who refuse to provide any appreciable

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[43]U.S. DEPT. OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, pt. 1, at 210 (1975). This percentage increased in the rate of inflation is based on an 81.4 consumer price index in 1956 compared to an index of 104.2 in 1968.

[44]Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263 (codified at 18 U.S.C. § 608 (1976)).

[45]*Id.*

[46]Inquiries at the major broadcast stations in Indianapolis revealed no time purchased by any minor party candidate in the 1976 election, although minor party candidates appeared on the ballot in Indiana in that election year for President, Governor, and United States Senator. Although no data were available about minor party purchase of advertisements in previous elections, no station representative with whom the author spoke remembered selling any time to minority party candidates in this decade.

[47]47 U.S.C. § 315 (1976).

amount of "sustaining" time and whose rates are often prohibitively high, minor party candidates continue to lack public understanding of their proposals. Although the Wallace campaign of 1968 had more money and received more votes than any other minor party effort in forty years, it was able to purchase far less time than the competing major party candidates.[48]

2. Sustaining Time for Candidates.—The broadcasting industry has made repeated requests to Congress to modify or entirely repeal section 315, as their testimony before Congress in 1971 demonstrates.[49] American Broadcasting Company (ABC) spokesperson Everett H. Erlick noted that the network had "previously suggested a trial suspension of section 315 for *all* candidates—at every level of government."[50] He supported the suspension of section 315 for the 1972 national races, which the committee was then considering, claiming that it would "contribute significantly to alleviating the increasingly heavy cost of running for the Presidency. Moreover, the greater freedom and flexibility afforded the broadcaster in campaign coverage would benefit the public directly."[51]

Julian Goodman of the National Broadcasting Company (NBC) supported the proposal to suspend section 315 for national races in 1972 but also favored complete repeal of section 315:

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[48]"[I]n January 1969, the FCC reported that the Republicans had outspent the Democrats for television time, 5 million dollars to 3, during the 1968 Presidential campaign. Other groups (referring mainly to the American Independent Party of George Wallace) spent $681,491 on television." E. Chester, *supra* note 26, at 280.

[49]*Federal Election Campaign Act of 1971, Hearings on S. 1, S. 382 and S. 956 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 328-30 (1971) [hereinafter cited as *1971 Hearings*]. A major revision of the nation's communications law was proposed in the Communications Act of 1978 by Lionel Van Deerlin, chairperson of the House Communications Subcommittee of the Committee on Interstate and Foreign Commerce, and Lou Frey, that subcommittee's ranking minority member. H.R. 13015, 95th Cong., 2d Sess., 124 CONG. REC. 5128 (1978). Although that bill did not leave the Committee in the 95th Congress, it is expected to be seriously considered by Congress in the next few years. H.R. 13015 would greatly alter the current equal opportunities doctrine by limiting its application only to television broadcasts for offices other than those elected on national or statewide bases. *Id.* § 439. In addition, the proposal would remove the current requirement of 47 U.S.C. § 312(a)(7) (1976) that candidates for federal office have reasonable access to broadcasting outlets. The Van Deerlin proposal makes no mention of the rates which broadcasters should charge for political programs, as opposed to the current requirement that those programs be billed at the lowest applicable rates.

Broadcasting industry officials have applauded the relaxation of the equal opportunities doctrine in the Van Deerlin proposal and have urged that its requirements be relaxed further. *The Communications Act of 1978: Hearings on H.R. 13015 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. 45, 166-67 (1978).

[50]*1971 Hearings*, *supra* note 49, at 329.

[51]*Id.*

> [T]he most effective step which the Congress could take to increase broadcast appearances of candidates would be the repeal of the equal opportunity requirements of section 315 of the Communications Act. This would enable broadcasters to schedule appearances of significant candidates in a variety of programs and formats without the penalty of making equal time available to candidates of "splinter" parties; such a penalty tends to limit the ability of broadcasters to present candidates with whom the public is concerned and disserves the public interest in the political process.[52]

Frank Stanton of the Columbia Broadcasting System (CBS) also supported suspension of section 315 for the 1972 national races. Although he did not here advocate total repeal of the section, he had previously expressed such a preference on numerous occasions.[53]

The network executives have argued that section 315 prevents them from giving major party candidates all the free time the networks would like to provide.[54] They have opposed, however, any proposals that they be required to give free time to any candidates. While they have advocated a total repeal of the equal opportunities requirement, they have also supported permanent or temporary suspension of section 315 for all national, statewide, and congressional contests. In support of their position, the executives cited the 1960 Nixon-Kennedy debates,[55] which were aired free of charge to the candidates and which were held after section 315 was temporarily suspended.[56] They used the debates as an example of the public service the networks could render in the absence of the equal opportunities doctrine. The executives claimed that the debates contributed significantly towards informing the voters about the two main candidates for President but asserted that such a service

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[52]*Id.* at 330.

[53]*Id.* at 328. For an example of Stanton's advocacy of repeal of the section, see *Equal Time, Hearings on S. 251, S. 252, S. 1696, and H.J. Res. 247 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 88th Cong., 1st Sess. 220-22 (1963) [hereinafter cited as *Equal Time*].

[54]*1971 Hearings, supra* note 49, at 328-30; *Equal Time, supra* note 53, at 220-22.

[55]In that year, the major party presidential candidates appeared together in a series of programs billed as debates that were broadcast over the major radio and television networks. Kennedy is generally credited with having made a better appearance than Nixon, although a more favorable opinion of Nixon's performance was held by those who heard the program on the radio. T.H. WHITE, THE MAKING OF THE PRESIDENT 1960, 288-91 (1961). Kennedy's appearance on the debates did make him better known to the voters which was important for an obscure Senator against the two-term incumbent Vice-President. Even though it is not possible to ascertain the extent that the debates altered voting patterns, these programs are often credited as having been a significant factor in Kennedy's narrow victory in the election. *Id.* at 293-94.

[56]*Equal Time, supra* note 53, at 100-01, 220, 248-49.

would not have been available had section 315 been in effect during the 1960 election campaign. Under section 315, the networks would have had to devote an equivalent number of program hours to minor party candidates or perhaps been forced to include those candidates in the debates with Kennedy and Nixon.[57]

The actions of the networks in providing free time to candidates in various races involving only the major parties[58] suggest that stations would not provide very much free political time if the requirements of section 315 were lifted.

Under the requirements of section 315, minor parties in 1956 collectively received as much free time as each of the major parties in which to present their candidates to the public.[59] Although this comparison represents the combined time of all the minor parties, they still had time for a brief presentation of their respective positions.[60]

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[57]*Id.*

[58]*See* notes 70-71 *infra* and accompanying text.

[59]Guback, *Political Broadcasting and Public Policy*, 12 J. BROADCASTING 191, 196 (1968). The following table shows the amount of sustaining time provided by the television networks to candidates and supporters in the presidential races of 1956, 1960, and 1964:

	REPUBLICANS	DEMOCRATS	OTHER	TOTAL
	(Time is in hours and minutes)			
1956 Time	10:43	8:25	10:30	29:38
% of total	36%	28%	35%	99%
1960 Time	18:21	19:26	1:35	39:22
% of total	47%	49%	4%	100%
% of change from 1956	+ 71%	+ 131%	- 85%	+ 33%
1964 Time	2:47	1:41	___	4:28
% of total	62%	38%	___	100%
% of change from 1960	- 85%	- 91%	___	- 89%

Id. The article also includes similar figures for the radio networks. *Id.* Data about commercial time made available to candidates omits time bought for spot announcements and therefore is of little value since spot announcements constitute the bulk of political time bought by candidates. *Id.* at 198-99.

[60]Nathan Karp of the Socialist Labor party has described the inequalities in the implementation of § 315 regarding minor party candidates. Referring to the 1956 election, Karp stated:

> Minority party candidates do not receive free time, comparable or otherwise, unless they specifically demand it. . . . It should also be noted that although the major networks covered Republican and Democratic National Conventions for several consecutive days in 1956, the only time that minority party

In 1960, by contrast, the networks provided more free time to the major parties, primarily for the "Great Debates" between Richard Nixon and John Kennedy, but cut the minor parties from their programming almost entirely.[61]

Political broadcasting has increasingly relied on paid advertisements rather than on free time provided by stations. In 1962, fewer than one-fourth of all television or radio stations devoted sustaining time to election campaigns, while ninety-five percent of them sold broadcast time to candidates.[62] The increase in sustaining time between 1962 and 1970 was modest, while the increase in the amount of paid political time and the number of stations broadcasting increased much more rapidly.[63] Thus, the importance of sustaining time had declined significantly in this period in relation to commercial time.

The experience of the Socialist Labor party in obtaining network time in 1960 is indicative of the plight of minor parties in that year.[64] The Mutual Broadcasting System did broadcast the acceptance speeches of the party's candidates for President and Vice-President, although many of its affiliated radio stations did not carry the broadcast. The company claimed that there was not "sufficient interest in the campaigns [of Socialist Labor candidates] to

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> candidates were allowed was an amount equal to the actual acceptance speeches by the candidates who were finally nominated by these conventions. And even in this latter respect the minority party candidates had to accept less— and often undesirable—time, or run the risk of spending all their time and energies in long drawn-out struggles to receive what under the law they were incontestably entitled to. . . . [Karp then discussed the inability of minor parties to monitor broadcasts to discover when major party candidates receive time or whether network broadcasts of the minority parties are being carried on most network affiliates.] Thus, while all candidates are equal under the law, some candidates are more equal than others, to use the Orwellian phrase.

Political Broadcasting, supra note 32, at 116.

[61]Guback, *supra* note 59, at 196-97.

[62]Of those giving sustaining time, 54% of television stations and 43% of AM radio stations gave 2 or more hours, while 1½% of television and under 1% of radio stations gave more than 10 hours. This represented about one-seventh of the time devoted to political broadcasting during the campaign. FCC, SURVEY OF POLITICAL BROADCASTING—PRIMARY AND GENERAL ELECTION CAMPAIGNS OF 1962 (1963), *reprinted in Equal Time, supra* note 53, at 2-14.

[63]The total of sustaining time for political candidates in 1962 was 50,000 minutes. *Id.* By 1970, the amount had increased to 70,000 minutes. *1971 Hearings, supra* note 49, Appendix A, at 687-1004.

[64]SENATE COMM. ON COMMERCE, FREEDOM OF COMMUNICATIONS, S. REP. NO. 994, 87th Cong., 1st Sess., pt.5, 295-385 (1961). This report on the effect of the suspension of § 315 for the 1960 national elections was prepared pursuant to S. Res. 305, 86th Cong., 2d Sess., 106 CONG. REC. 12522 (1960).

warrant our granting them time comparable to that which will be afforded to the candidates of the Democratic and Republican parties."[65]

ABC did grant fifteen prime time minutes on its television network to the presidential candidate of the Socialist Labor party, Eric Hass.[66] NBC television broadcast a half-hour program involving several minority party candidates.[67]

CBS confined its television coverage of minor parties in 1960 to a half-hour program. Appearing on "Other Hats in the Ring" were the candidates of the Prohibition party, American Vegetarian party, and the American Beat Consensus. Also on the program was veteran Socialist party campaigner Norman Thomas, who was not running in the 1960 election.[68]

In the next presidential election, minor party candidates continued to have limited access to the airwaves. One commentator analyzed the networks' performance in 1964:

> For the 1964 campaign, Congress refused to suspend the equal time requirement for presidential and vice presidential candidates, although the broadcasting industry strongly favored the suspension. Seemingly as a penalty for Congressional refusal, networks drastically cut sustaining time offered to candidates and supporters. Not only was the time offered less than in 1960, it was even less than in 1956. If parties wanted network time, they could buy it. Thus, in 1964, the major parties received only 4 hours and 28 minutes of free television network time, while all third parties received nothing. From radio, Republicans and Democrats received almost 21 hours during which to present their candidates and views, while all third parties received only 30 minutes. As far as sustaining time on radio and television networks was concerned, third parties suffered almost a complete blackout.[69]

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[65]*Id.* at 321 (letter from Joseph Keating of Mutual to Nathan Karp of the Socialist Labor party (Sept. 20, 1960)).

[66]*Id.* at 323 (letter from Mortimer Weinbach of ABC to Ben Waple of the FCC (Sept. 27, 1960)).

[67]*Id.* at 302 (letter from Kathryn Cole of NBC to Ben Noble, Jr., of the Constitution party (Oct. 28, 1960)). This letter does not mention which parties were invited to appear.

[68]*Id.* at 375 (CBS news release, Oct. 27, 1960). Hass had been invited but refused to appear because of objections to the appearance of the American Beat Consensus candidate. *Id.* at 374 (letter from Patrick Murphy Malin of the American Civil Liberties Union to Sig Mickelson of CBS (Nov. 1, 1960)).

[69]Guback, *supra* note 59, at 197. In 1968, the networks provided a total of three hours of free television time to national candidates. *1971 Hearings*, *supra* note 49, at

In many political races, the only candidates have been those from the two major parties; consequently, the broadcasting stations could have offered significant amounts of free time to all the candidates if they chose without having to offer any time to minority parties. In 1964, twenty of the thirty-four Senate races involved only two candidates. Only twenty-nine percent of the television stations in those states provided free time, the same percentage as in states with three or more senatorial candidates.[70] The record in 1968 was even more dramatic: only thirty-four percent of the stations with two-person Senate races offered any free time, while forty-five percent of stations with multi-candidate races offered free time.[71] Free time provided by networks is proportionately much greater than that provided by local stations.[72]

One solution for meeting the problem of adequate access for candidates to the broadcast media would be for Congress to require stations to allocate specified amounts of free time to candidates for certain major offices. Such proposals have been frequently made but have never been passed by Congress.[73] These proposals have advocated that broadcast stations be required to provide free time as one prerequisite for obtaining a license to operate or for renewing such a license. Alternatively, they have suggested that the stations be recompensed through government subsidies or tax credits.[74] These proposals, sometimes referred to as "Voters' Time," would require that political time be offered to all candidates for specified offices without charge. These proposals have differed widely in their treatment of minor party candidates.

When Congress amended section 315(a) in 1959, it deferred action on more far-reaching changes such as proposals for "Voters' Time."[75] It did consider such suggestions the following year in hear-

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188. It is generally agreed that there was no suspension in 1964 because President Lyndon Johnson did not wish to debate against his opponent Senator Barry Goldwater of Arizona, because the Democratic candidate was favored to win overwhelmingly. Similarly, in 1968 there was no suspension because the Republicans did not want George Wallace to participate in a debate or to be given free time equivalent to that given to Richard Nixon and Hubert Humphrey.

[70]Wick, *supra* note 38, at 612 n.130.

[71]*Id.*

[72]For example, only one of the major Indianapolis broadcast stations reported providing any sustaining time for appearances of candidates for statewide election in 1976; none of them provided any free time to presidential candidates in that year. While much of the emphasis on the effect of § 315 has been placed on the performance of the networks and the problems affecting presidential candidates, the problems of lack of access to broadcasting and an ill-informed electorate appear to be greater in regard to local stations and statewide or local election races.

[73]*See* notes 77-81 *infra* and accompanying text.

[74]*Id.*

[75]S. REP. NO. 1539, 86th Cong., 2d Sess. 2, *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS 3252, 3253.

ings which resulted in passage of legislation to exempt the presidential and vice-presidential races from the coverage of section 315 in that year's election.[76] S. 3171, sponsored by twenty-two Senators in 1960, would have required stations and networks to provide free time to presidential candidates whose parties received at least four percent of the vote in the previous presidential contest. Each station would have had to provide one hour of prime time in each of the last eight weeks of the campaign in blocks of back-to-back hour spots for every candidate. Under this proposal, which did not emerge from committee, only the Democratic and Republican parties would have qualified for free air time in 1960.[77]

In the following years, similar proposals for free broadcast time for candidates were made by members of Congress and legal commentators. Senator Mike Mansfield of Montana proposed giving subsidies of $1,000,000 to major parties in order to enable them to pay for broadcasting.[78] Senator Hugh Scott of Pennsylvania advocated giving equal free time to parties gathering ten percent of the votes in the previous election. Any party not so qualifying but appearing on the ballot would receive a maximum of five percent of the time allotted to a major party.[79] FCC Chairman Dean Burch suggested that to receive free time, a party must have received at least two percent of the votes in the last election or obtain the signatures of one percent of the number voting in the previous election. For the national offices, he proposed an additional requirement that the party be on the ballot in at least thirty-four states.[80]

Observers proposed varying criteria regarding access of minority party candidates to free broadcast time, ranging from allowing minor parties one-thirtieth of the time allocated to major parties to proposals that they be granted at least half of the time given to major parties; some even suggested the repeal of section 315, which would have had the likely effect of denying minor parties any broadcast time at all in most races.[81]

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[76]*Id.* at 3255-57.

[77]S. 3171, 86th Cong., 2d Sess., 106 CONG. REC. 5146 (1960).

[78]Guback, *supra* note 59, at 206.

[79]Scott, *Candidate Broadcast Time: A Proposal for Section 315 of the Communications Act*, 56 GEO. L.J. 1037, 1047-48 (1968).

[80]*1971 Hearings*, *supra* note 49, at 186 (statement of Dean Burch); Wick, *supra* note 38, at 618-19.

[81]*See generally*, Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy*, 37 U. CIN. L. REV. 447 (1968); Freeman & Edelstein, *supra* note 41; Geller, *Political Broadcasts—A Few Short Steps Forward*, 20 CATH. U.L. REV. 449 (1971); McGranery, *Exemptions from the Section 315 Equal Time Standard: A Proposal for Presidential Elections*, 24 FED. COMS. B.J. 177 (1970-71); Singer, *supra* note 26; Wick, *supra* note 38; Note, *Equal Opportunity in Political Broadcasting: A Dying Ideal*, 8 SW. U.L. REV. 991 (1976); 22 CATH. U.L. REV. 177 (1972).

It is unreasonable to base free broadcast time or campaign subsidies upon the showing of the political party or the candidate in the previous presidential or other major election. Since these minor parties arose as vehicles for expressing positions of great concern at the time, they have not endured for long. In some instances, when the parties' issue disappeared or was adopted as the program of one of the major parties, these minor parties died. Thus, they would have failed to satisfy the aforementioned requirements that are based upon performance in prior elections.

For example, the Wallace campaign of 1968 would have received no subsidies based upon its strength in 1964 because it did not exist four years earlier. Similarly, it would not have been reasonable to grant funds to the American Independent party in 1972 as a result of Wallace's performance in 1968 since in 1972 the party had few adherents, and Wallace at the time was again a Democrat. Determination of subsidies to parties should be based on methods which assess present rather than past strength so that minor parties receive funds at the time of their greatest popularity.[82]

All five of the minor party efforts that obtained more than 1,000,000 votes for President in this century[83] were forces of significance for only one presidential election. While each expressed important issues or grievances that did not disappear after its respective campaign, each of the parties failed to endure. One reason for their rapid rise and fall is that each party centered around a prominent individual who led its ticket; when those individuals deserted the minor parties, those parties lost almost all of their previous appeal to the electorate.[84]

Although most legislative proposals distinguishing among candidates have focused on the party organization, these minor parties in fact have not been organizationally significant except as vehicles

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[82]A further problem applies to independent candidates running without benefit of a formal party's support. While this Note has focused on the problems faced by minority party candidates, the same, and perhaps greater, obstacles face independent candidates.

[83]Progressive parties of 1912, 1924, and 1948, State Rights party of 1948, and American Independent party of 1968 all polled over 1,000,000 votes for President. *See* text accompanying notes 8-11 *supra*.

[84]For specific election data, see U.S. DEPT. OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, pt. 2, at 1073 (1975); U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1978, at 502 (1978). These sources provide a reference to the popular vote received by the Progressive party in the 1912, 1924, and 1948 presidential elections, by the State's Rights party in the 1948 election, and by the American Independent party in the 1968 election. Compare these results with the performance of the same parties in the following presidential election at which time their candidates for the prior election had either died or had deserted the party.

to present their presidential candidates. All but one of these five candidates repudiated the minor party that had nominated him by the time of the next election.[85]

Equal treatment of candidates on the ballot is one solution. For the presidential race, candidates on the ballot in enough states to win a victory in the electoral college would be eligible for free time or subsidies for broadcast time in those states in which they appeared on the ballot. No candidate would qualify for these benefits if he was legally ineligible to hold the office sought. For example, a candidate not meeting the minimum age requirement for the office or an alien seeking the position would not be entitled to the benefits, even if able to be placed on the ballot.

Limiting benefits to those presidential candidates who are on the ballot in enough states to win the office does have some drawbacks. This test does ignore the nature of the electoral college system, penalizing a third party that had a great deal of strength in several states or a region of the country while not appearing on the ballot elsewhere. If this argument were deemed sufficiently strong to permit candidates to receive free air time or subsidies whether or not the aforementioned test was satisfied, they should be limited to those stations serving states in which they are placed on the ballot.

Requiring that a candidate be on the ballot for the office sought appears to be a minimum proof of the seriousness of the candidacy, although there have been rare instances of serious races by write-in candidates.[86] Perhaps such a candidate could be allowed to meet an alternative requirement, such as obtaining the signatures of a specified percentage, perhaps one percent, of those who voted for the office in the previous election.[87]

This percentage test may be a substantial burden to write-in candidates and their supporters, who would be forced to devote significant time and resources to a requirement not imposed upon major parties. This test appears to have a clearer connection to seriousness of candidacy than does the requirement that a candidate

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[85]The sole exception was La Follette, who died the year following his race for the presidency.

[86]J. Strom Thurmond of South Carolina won election to the United States Senate in 1954 as a write-in candidate. U.S. CONGRESS, BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS 1774-1971, at 1817 (1971).

[87]In Williams v. Rhodes, 393 U.S. 23, 33 (1968), the Supreme Court struck down a requirement that 15% of the voters in a past election sign petitions to allow a non-major party access to the ballot but said that it would allow a 1% standard which it characterized as a "very low number of signatures." More recently, in Jenness v. Fortson, 403 U.S. 431 (1971), the Court upheld Georgia's election statute requiring candidates for office to obtain signatures of 5% of those eligible to vote in the last election for the office being sought. *Id.* at 442. The requirement applied to independent candidates and those nominated by any party whose candidate received under 20% of the vote at the most recent gubernatorial or presidential election.

for President appear on the ballots of a minimum number of states because the latter prerequisite penalizes serious regional candidates.

3. Effects of the 1959 Amendment.—The 1959 amendment to section 315[88] was drafted so broadly that candidates can receive extensive coverage that is not subject to the requirement of equal access to all candidates for the same office. Incumbents reap a significant advantage since they can receive media attention merely by carrying out the duties of office, including ceremonial duties. Much more effort is required for a non-incumbent to do something which will be considered newsworthy. Often, minor party candidates will be unpopular or will not be taken seriously by broadcasters. It is true that incumbents are often engaged in activities which are of significant newsworthiness. These activities are properly excepted from the coverage of section 315. Many times, however, incumbents engage in ceremonial activities, arguably for the primary purpose of receiving news coverage of their candidacy. These appearances should trigger the equal opportunities requirement of section 315.

Presidential campaigning in recent years has involved much travel by candidates so that they may appear on local news broadcasts in several different media markets each day of the campaign. Minor party candidates are seriously disadvantaged because they often cannot afford the travel and related costs of such campaigning. This disadvantage is compounded if the minor party candidate does make an appearance, but local media do not judge it newsworthy. In 1972, when Benjamin Spock of the Peace and Freedom party was actively campaigning for the presidency, he was denied news coverage on the television networks during the final three weeks of the campaign.[89]

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[88]Act of Sept. 14, 1959, Pub. L. No. 86-274, 73 Stat. 557 (1959) (codified at 47 U.S.C. § 315(a) (1976)).

[89]*FCC Tells Spock: No Time Due*, BROADCASTING, Nov. 13, 1972, at 20-21. Spock complained to the FCC and requested half an hour of free time on each of the three networks, under the fairness doctrine. The FCC ruled against Spock on Nov. 6, 1972, by a five to one vote. Since this decision was made so close to the election, Spock did not appeal it to the courts. The fairness doctrine under which Spock had objected to his lack of coverage is part of 47 U.S.C. § 315(a) (1976). The Supreme Court has described its reach:

> Formulated under the Commission's power to issue regulations consistent with the "public interest," the doctrine imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints. *See Red Lion*, 395 U.S. at 377. In fulfilling the Fairness Doctrine obligations, the broadcaster must provide free time for the presentation of opposing views if a paid sponsor is unavailable, . . . and must initiate programming on public issues if no one else seeks to do so.

Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110-11 (1972).

In the 1976 presidential election, the joint appearances of Gerald Ford and Jimmy Carter qualified as bona fide news events and, therefore, did not trigger the equal opportunities doctrine. It is apparent that this series of events was *manufactured* for television broadcast and was not a bona fide news event as evidenced by the fact that the speakers remained mute for more than twenty minutes in the first meeting when the audio portion of the broadcast machinery ceased working. Thus, it is obvious that they were more interested in speaking to their national television audience than to their live audience.[90]

4. Federal Election Campaign Act of 1971.—The funding of minor party campaigns and reform of section 315 were included in the general issue of campaign finance reform that Congress has considered in recent years.[91] Among the bills considered by Congress in 1971 were proposals to provide substantial free time on broadcasting stations for major candidates and permanent suspension of section 315 for presidential and vice-presidential races.[92]

One of the major advocates of campaign reform was Newton Minow, a former FCC Commissioner, who had served as Chairman of the Twentieth Century Fund Commission on Campaign Costs in the Electronic Era; that private commission's proposal regarding political broadcasting was called "Voters' Time." Under this proposal, all "significant" candidates were to be granted time on all television and radio stations simultaneously during the five weeks prior to the general election. Major party candidates would receive six half-hour segments, no more than two of which could be in the

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[90]Treating candidates' debates or the press conferences of individual candidates as bona fide news events and thus exempt from the equal time requirement under 47 U.S.C. § 315(a)(4) (1976) resulted from an FCC order in 1975 whose validity has been upheld. Chisholm v. FCC, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976), *aff'g* Aspen Inst. Program on Communications and Soc'y, 55 F.C.C.2d 697, 35 RAD. REG. 2d (P & F) 49 (1975). The *Chisholm* court found appropriate the FCC interpretation of § 315:

> [H]enceforth, debates between qualified political candidates initiated by non-broadcast entities (non-studio debates) and candidates' press conferences will be exempt from the equal time requirements of Section 315, provided they are covered live, based upon the good faith determination of licensees that they are "bona fide news events" worthy of presentation, and provided further that there is no evidence of broadcaster favoritism.

538 F.2d at 351 (footnote omitted). Subsequently, the requirement of live coverage was dropped, replaced by a requirement for rebroadcast within 24 hours of the live event unless unusual circumstances warranted a longer delay. Delaware Broadcasting Co., 60 F.C.C.2d 1030, 38 RAD. REG. 2d (P & F) 831 (1976).

[91]Previous to the 1971 and 1974 reform acts, the major campaign regulation had been accomplished by the Federal Corrupt Practices Act of 1925, Pub. L. No. 68-506, § 30, 43 Stat. 1053 (repealed 1972), and the Hatch Political Activity Act of 1939, Pub. L. No. 76-252, 53 Stat. 1147 (codified in scattered sections of 5, 18 U.S.C. (1976)).

[92]*1971 Hearings*, *supra* note 49, at 152. The former goal was proposed in S. 1, while the latter was the subject of both S. 382 and S. 956.

same week. Other parties would receive lesser amounts of time.[93] Minow claimed that United States' campaign practices were unusual as well as in need of reform:

> The United States is the only country in the world where political candidates purchase time to take their case to the electorate, and I think a very serious study of the system that is used in Great Britain and in Canada and in Germany and in Japan and in other countries is very much in order for this country, because I think there is a lot to be learned.[94]

The Revenue Act of 1971 first introduced into federal law a distinction among parties legally entitled to appear on ballots on the basis of whether they were "major," "minor," or "new."[95] These distinctions were made to determine which parties would be entitled to campaign funds from the public treasury and to establish the amount of each entitlement. A Senate report in 1974 indicated a clear intent to channel political development into the two-party system:

> [T]he Committee bill would not stimulate a proliferation of splinter parties or independent candidates. Such a proliferation would undermine the stability provided by a strong two-party system and could polarize voters on the basis of a single volatile issue.
>
> All but fringe candidates would have an incentive to seek a major party nomination, rather than run as a minor party candidate, so as to be eligible for the full level of public assistance in the general election. The bill would thereby have a cohesive effect, encouraging different factions to compete and work out coalitions within the framework of a basic two-party system.[96]

The Report claimed that the bill met the constitutional requirement of allowing minor parties to retain their opportunity to grow into major parties:

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[93] *1971 Hearings*, *supra* note 49, at 404-06 (statement of Newton Minow).

[94] *Id.* at 402.

[95] The Revenue Act of 1971, Pub. L. No. 92-178, § 801, 85 Stat. 497 (now I.R.C. § 9002). Major parties are defined in this act as those which received 25% of the vote in the previous election. Minor parties are those which received 5 to 25% of the vote in the previous election. New parties are those which received under 5% in the previous election or which did not exist at the time of the earlier election.

[96] SENATE COMM. ON RULES AND ADMINISTRATION, FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974, S. REP. NO. 689, 93d Cong., 2d Sess. 8 (1974).

> [T]he legitimate interest in preserving the benefits of two major parties does not justify laws which would choke off competition by other parties . . . .
>
> The bill complies with this requirement. It does not prevent minor parties from placing candidates on the ballot or from organizing resources to support them. It does not freeze the political status quo.[97]

The campaign reform act[98] reviewed in *Buckley v. Valeo*[99] contained sections placing limits on contributions to and independent expenditures for candidates, imposing limits on expenditures by candidates and parties, requiring reporting and disclosure of contributors of funds over specified amounts to political candidates and parties, providing for public financing of primary and general elections for President, making available public financing of political conventions at which presidential candidates are selected, and creating a Federal Election Commission to administer and enforce these provisions.

In *Buckley*, the Supreme Court upheld the limits on contributions against attacks that they placed an unjustified burden on first amendment freedoms[100] and that the limits invidiously discriminated against minor party and non-incumbent candidates in violation of the fifth amendment.[101] However, the Court found that the limitations on total political expenditures by an individual in one calendar year[102] and by a candidate out of his own funds[103] violated the first amendment.

Also attacked in *Buckley* was the Act's requirement of disclosure to the Federal Elections Commission of all contributions over ten dollars and the disclosure to the public of all contributions over one hundred dollars. Plaintiffs maintained that these requirements were overbroad in their effect on minor party campaigns.[104] The Court rejected this argument, holding that the peti-

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[97] *Id.* at 9.

[98] Federal Election Campaign Act of 1971 *as amended, supra* note 3.

[99] 424 U.S. 1 (1976).

[100] *Id.* at 24-29.

[101] *Id.* at 30-35.

[102] *Id.* at 39-51.

[103] *Id.* at 51-54.

[104] The plaintiffs included Eugene McCarthy, an independent candidate for President in the 1976 election; James S. Buckley, a United States Senator from New York seeking re-election that year; The Committee for A Constitutional Presidency—McCarthy '76, an independent political organization; several state and national political parties, such as the Libertarian party, the Conservative party of New York, and the Mississippi Republican party; numerous interested organizations, including the New York Civil Liberties Union, Inc., the Conservative Victory Fund, and the American Conservative Union; and an unspecified potential political contributor.

tioners did not demonstrate sufficient injury to minor party candidates and minor parties to justify invalidating that section of the law.[105]

In addition, the Court found the composition of the Federal Elections Commission to be unconstitutional[106] because the provision for members to be appointed by the leaders of Congress was thought to violate the separation of powers clause of the United States Constitution.[107]

The part of the election law most significant for minority parties is that concerning the funding of political campaigns.[108] Funding of $2,000,000 is made available for each major party's convention, which is the limit set for expenses allowed at the convention.[109] Other parties are entitled to limited percentages of the major parties' entitlement based on the vote in the previous national election;[110] a party not choosing its candidates at a convention would not be entitled to any funds under this section. Had this law been in

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[105]424 U.S. at 68-74. The Court indicated that the plaintiffs in *Buckley* failed to show "specific evidence of past and present harassment of members (or contributors) . . . due to their associational ties" or that the disclosure requirements "will subject them to threats, harassment, or reprisals from either government officials or private parties." *Id.* at 74. This indicates that, while no blanket exemption from the Act's disclosure requirements was available to minor parties and their candidates, the Court might find that certain kinds of facts would justify waiving the disclosure requirements in order to protect first amendment rights.

A recent opinion made use of this exception to the disclosure requirements. Socialist Workers 1974 Nat'l Campaign Comm. v. Federal Election Comm'n, No. 74-1338 (D.D.C. Jan. 3, 1979). The court's judgment was that the *Buckley* exception to the disclosure requirements applied. *Id.*, slip op. at 3. The decision cited no facts to establish that the exemption applied. Both parties agreed that the actual facts justified suspension of enforcement of some of the disclosure requirements. *Id.*, Stipulation of Settlement at 2. Information about contributors and recipients of expenditures of the Socialist Workers party will not have to be disclosed as required by the campaign laws. *Id.*, slip op. at 4. The party may place on all its literature and campaign advertisements the following statement: "A federal court ruling allows us not to disclose the names of contributors in order to protect their First Amendment rights." *Id.* The exemption from disclosure requirements will last through 1984. *Id.* at 6.

[106]424 U.S. at 109-43.

[107]Art. II, § 2, cl. 2.

[108]Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified in scattered sections of 2, 5, 18, 26, 47 U.S.C. (1976)). The author believes that the disclosure requirements also represented significant harm to minority parties.

[109]I.R.C. § 9008(b)(1). The figures provided under the Act are for 1976 and will increase with the level of inflation in future years. The figures are dependent upon having an adequate amount of money in the Presidential Election Campaign Fund to satisfy all entitlements in any election year. If the funds are not adequate, first funding goes to the conventions; next it goes to the general election, and only then does anything remaining go to primary campaigns. *Id.* §§ 9006(c), 9008(a), 9037(a).

[110]I.R.C. § 9008(b)(2).

effect in 1968, George Wallace's party would have received no public funds for its convention since the party had not been in existence four years earlier. In 1972, when the party was a far less significant electoral force, it would have received about $280,000 for its convention. The same formula applies to the general election, which means that the party would have received about $2,800,000 for its general election campaign in 1972.[111]

With respect to public notoriety in political campaigns, primaries present problems for minor parties because they usually do not hold them. Under the election law, major party candidates receive funds for their primary election contests.[112] These funds help make major party candidates known to the electorate, while minor party candidates are not eligible to receive similar assistance. Similarly, under section 315 of the Communications Act, a campaign appearance on broadcast media by a candidate in a primary would lead to equal opportunities for other candidates only if they participated in the same primary election. Thus, candidates in uncontested races and candidates belonging to minor parties without primaries do not get the opportunity to reach the electorate which is afforded to candidates with contested primaries.

In the general election, the major parties each receive $20,000,000.[113] Minor parties receive a proportion of that amount determined by their percentage of the vote four years earlier.[114] If a minor party gathers more votes in the current election than in the previous election, it would be entitled to additional federal funds for the purpose of paying campaign debts.[115] A further requirement for receiving funds to be used in the general election is that a party must be on the ballot in at least ten states.[116]

The public financing provisions were attacked on three grounds, which were all rejected by the Court in *Buckley*.[117] First was the claim that the granting of funds for political campaigns exceeded the bounds of congressional power under the "general welfare" clause of

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[111]These figures are based on calculations that since Wallace received 14% of the votes cast in 1968, his party would have been entitled to 14% of the sums given to each major party for its convention and general election expenses. *See* text accompanying note 11 *supra*.

[112]I.R.C. §§ 9031-9042.

[113]*Id.* § 9004(a)(1).

[114]*Id.* § 9004(a)(2)(A).

[115]*Id.* § 9004(a)(3). Similarly, a party in the "new" category, one not existing four years earlier or one having received under five percent of the votes in the previous election, gets no funding until after the campaign and receives funds then only if its vote total was over five percent of the votes cast for the office.

[116]I.R.C. § 9002(2)(B).

[117]424 U.S. at 90-97.

the United States Constitution.[118] Second was a claimed violation of the first amendment, using an argument that analogized the establishment clause, on the basis that the public financing of some but not all political parties established the parties that did receive funds in a preferred position. The third argument asserted that this statutory section discriminated against candidates of non-major parties and thus violated the fifth amendment due process clause.

In *Williams v. Rhodes*,[119] the Supreme Court in 1968 held that the first amendment guarantees of free speech and association were violated when a state acted to favor established parties over other parties, absent a compelling state interest.[120]

In *Buckley*, the Court did not find that the campaign law discriminated against the non-major parties: "[T]he inability, if any, of minor-party candidates to wage effective campaigns will derive not from lack of public funding but from their inability to raise private contributions."[121] It pointed out further that minor or new parties had an advantage over major parties in that the former were not subject to the limitation on total expenditures which was imposed on the latter.[122] The Court did acknowledge the argument that this benefit would generally be only an academic one.[123]

There is no correlation between the appeal of a candidate and his ability to raise significant amounts of money, but there is a close connection between the raising of funds and the ability to run an effective political campaign. It is possible to conceive of a candidate with strong support from the poorest citizens but without other major support. Similarly, a party whose program is opposed to capitalism is unlikely to receive much financial backing but might receive much electoral support.

The Court in *Buckley* claimed that since the past achievements of minor parties "in furthering the development of American democracy" had occurred without public funding, their inability in

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[118]Art. I, § 8, cl. 1.

[119]393 U.S. 23 (1968).

[120]*Id.* at 31. The Court stated:

> [T]he Ohio laws before us give the two old established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate. . . . In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake the decisions of this Court have consistently held that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."

Id. (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

[121]424 U.S. at 94-95.

[122]*Id.* at 9.

[123]*Id.* n.129.

the future to receive public funds should not disadvantage them.[124] The majority held that if a party appears to have a good prospect of receiving over five percent of the vote, it will be an acceptable loan risk. In light of the difficulties often faced by major party candidates in securing loans or gifts, it is perhaps unreasonable for the Court to assert that minor party candidates are likely to be acceptable loan risks.

Only two Justices in *Buckley* argued that the law discriminated improperly against minor parties and their candidates. Chief Justice Burger noted: "The fact that there have been few drastic realignments in our basic two-party structure in 200 years is no constitutional justification for freezing the status quo of the present major parties at the expense of such future political movements."[125]

Justice Rehnquist most cogently analyzed the harm done to minority parties by the Act. He agreed with the majority that the law may require, prior to the allotment of funds, "some preliminary showing of a significant modicum of support."[126] He argued, however, that the law had gone far beyond this permissible requirement by giving a permanent and unconstitutional preference to the current major parties.[127]

Minor parties are disadvantaged under the election statute not only in regard to the receipt of public funds, but also by the requirement that all contributors of over ten dollars be listed by the parties. There is a great potential for reprisals against people listed as contributing to the Socialist Labor party, the American Independent party, or other minor parties. The Court, however, held that such harassment had not been shown by the plaintiffs and was merely speculative.[128] The Court found *Buckley* distinguishable from

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[124]424 U.S. at 102.

[125]*Id.* at 251 (Burger, C.J., dissenting).

[126]*Id.* at 293 (Rehnquist, J., dissenting) (quoting Jenness v. Fortson, 403 U.S. 431, 442 (1971)).

[127]*Id.* at 293-94. Justice Rehnquist stated:

> It has enshrined the Republican and Democratic Parties in a permanently preferred position, and has established requirements for funding minor party and independent candidates to which the two major parties are not subject. . . . I find it impossible to subscribe to the Court's reasoning that because no third party has posed a credible threat to the two major parties in Presidential elections since 1860, Congress may by law attempt to assure that this pattern will endure forever.
>
> I would hold that, as to general election financing, Congress has not merely treated the two major parties differently from minor parties and independents, but has discriminated in favor of the former in such a way as to run afoul of the Fifth and First Amendments to the United States Constitution.

Id.

[128]*Id.* at 68-72.

NAACP v. Alabama,[129] which had struck down a state requirement that the National Association for the Advancement of Colored People list all of its members with the state of Alabama. There, the Court had found "an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members [had] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[130] Another distinction is that in *NAACP*, production of the membership lists was not justified as essential to the purpose of the state law under challenge,[131] while in *Buckley* listing and disclosure of political contributors was a central means of carrying out one of the Act's purposes, that of eliminating corruption and influence-buying in political campaigns.[132]

IV. Conclusions and Proposals

No proposal for political broadcast reform will accommodate the public's need to learn about diverse political viewpoints unless it provides for free time to candidates. The right to be heard should not be dependent upon the ability to raise money. The public's right to be informed over the airwaves could be required as a public service, or the government could recompense the stations and networks directly or through tax benefits.

This reform raises important questions as to its scope. There must be some minimal requirement that a candidate be serious, which may be measured by the number of states in which a presidential candidate appears on the ballot or by a requirement that a specific percentage of voters sign a petition. Free time based

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[129]357 U.S. 449 (1958). The NAACP is a nonprofit membership corporation organized under New York laws for the purpose of advancing the welfare of black citizens. It had chartered an affiliate in Alabama that was an unincorporated association. Alabama filed an equity claim to enjoin the NAACP from doing business in the state because of its failure to comply with the state law requiring filing as a foreign corporation. The state court ordered the NAACP to cease its activities in Alabama. On the state's motion, the court ordered the production of many of petitioner's records, including its membership lists. The NAACP supplied all the records sought except the lists and was adjudged in contempt of court for which it was fined $100,000. The United States Supreme Court held the Alabama court order to be invalid under the first amendment to the United States Constitution, since compelled disclosure of NAACP membership lists would be likely to constitute an effective restraint on its members' freedom of association. The state's interest in compelling disclosure of the membership lists was not shown to be sufficient to overcome the constitutional objections to the production order. *Id.* at 460-66.

[130]*Id.* at 462.

[131]*Id.*

[132]424 U.S. at 70.

upon performance in past elections does not measure present political strength and significantly hinders minor parties.

With the growth of cable television increasing massively the number of broadcast stations, providing free time to all candidates may prove to be a lesser burden to broadcasters in the long run than it would be now. An increase in the number of stations would mean that the amount of free time required of each would be reduced proportionately. In addition, since cable systems have so many channels, dozens of other programs would be available to viewers at any time while political broadcasts were being made by all candidates for major national and state offices. An electorate should have the right to be informed. At the same time, it should not be forced to watch political programs. Thus, there is no reason to have the politicians' statements broadcast simultaneously on all channels as proposed by the Twentieth Century Fund.[133] Although surely fewer people will watch political broadcasts when there are alternative commercial programs available, all the people would have the opportunity, at least, to view the candidates' presentations.

There are dangers of unfair treatment once government attempts to decide which of the various candidates entitled to appear on the ballot are "significant" or "major" ones. The test applied will usually allow the Democrats and Republicans to be so classified but will likely discriminate against other parties and candidates. If any restrictions are placed upon minor party access to broadcasting, these restrictions should be drawn as narrowly as possible. If minor parties are to receive less time than major parties, they should still receive a significant percentage of that allowed to the major parties, such as fifty percent; proposals that they receive three or five percent are not much better than ones barring them from the airwaves.

Another measure to increase minor party access to broadcasting would be to revise the section 315 news program exception or at least to construe it more narrowly. At a minimum, such bogus news programs as the Carter-Ford meetings in 1976 should not be allowed without comparable time being provided to other candidates.

If reliance is to be placed on the fairness doctrine[134] to assure balance in the presentation of political candidates on news programs, that doctrine needs to be applied more strictly so that the situation involving Benjamin Spock in 1972 will not be repeated. The basic section 315 requirement of equal opportunities must be retained to prevent a single candidate from monopolizing the airwaves and to protect minor party candidates. This requirement should not pre-

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[133]TWENTIETH CENTURY FUND COMMISSION ON CAMPAIGN COSTS IN THE ELECTION ERA, REPORT 23, 52 (1969).

[134]*See* note 89 *supra*.

vent debates among candidates. As long as free broadcast time is made available to all candidates to use as they wish, nothing should hinder two or more candidates from pooling their broadcast time to appear together on one program. A proper interpretation of section 315 in 1976 should have considered the Carter-Ford meetings as "uses" under section 315, thereby requiring the television networks to provide equal opportunities for other presidential candidates to reach the electorate over the airwaves.

Some proposals for equalizing the ability of candidates to reach the public would not accord with the mandate of the first amendment. Among these would be restricting the lengths of campaigns, prohibiting candidates from using political broadcast time other than that which is provided free of charge to all candidates, requiring that all expenditures supporting a candidate be included within that candidate's spending ceiling, and curbing the amount which wealthy persons could spend to further their own candidacies.[135]

In addition to requiring free broadcast time for all candidates for specified offices, similar across-the-board treatment could be given to candidates with respect to other kinds of campaign expenses in order to assure that all of them have at least a minimally equivalent access to the electorate. Perhaps the printing and mailing costs of one free brochure to all voters could be subsidized by the government on behalf of each candidate in those states where he appears on the ballot.

It should not be surprising that Congress and the Supreme Court have acted in a way that will enshrine the current two major parties in preferred positions from which it will be difficult for others to dislodge them. Minor parties in this century have been of fleeting importance politically and have often represented unpopular causes. The experience and orientation of those in Congress and on the Court have been toward a two-party system. Despite their protestations that they are not trying to restrict third parties, they tend to view a two-party system as proper and inevitable in American political life. Even if these perceptions are accurate as to the future course of our politics, there are two flaws in their reasoning. Even if the country continues with a two-party system, nothing should be done to assure that the current major parties be the ones to survive. Secondly, the Constitution, which does not mention parties at all, should not be read as allowing discriminatory treatment against third parties and independents.

The key, then, to allowing minor party access to the electorate is to require free broadcasting time for all candidates for certain offices. Fund-raising ability should not determine a party's ability to

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[135]424 U.S. at 17-23, 51-59.

reach the public, nor should public funds increase the disparity between major and minor parties. If distinctions are made among parties regarding access to broadcasting and to the public treasury, those distinctions should be narrowly drawn so as to avoid being unreasonably discriminatory. While the burden imposed by these proposals on television and radio stations is not as severe as their owners maintain, the size of the burden is likely to be lessened considerably by the extension of cable systems throughout the nation. Together, these proposals would increase the public's opportunity to be informed about all parties and candidates so that the people could then make their own, and hence the best, decisions.

ALAN RAPHAEL

The Equal Opportunity Doctrine in Political Broadcasting: Proposed Modifications of the Communications Act of 1934

"A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." —JAMES MADISON[1]

I. INTRODUCTION

To democratic societies, the rights to speak freely, to hear and be heard, and to write and publish are paramount—indeed the true test of a nation's freedom. Critical to the viability of these rights is a mass communication network capable of providing the flow of information necessary for making everyday decisions. Contemporary media enable citizens to make economic choices as to the best way to allocate their resources among the many products vying for their attention. The media records history as it happens. Perhaps the key function, however, is creating the political framework of the time—being the marketplace of political thought.

Few people today would challenge the role of the media, particularly the electronic media, as a forum for shaping opinions and as a vehicle for reaching the greatest number of people for the least amount of dollars.[2] A tension always exists between the people's "right to know" and the government's natural concern over possible manipulative abuses by the media in the exercise of its first amendment right to freedom of the press.[3] Concern with potential abuses peaked with the advent of radio in the 1920's and led to the policy decision that some degree of regulation and control was advisable. Although freedom of speech and press ranked high as national ideals, the unique persuasive power of the new media was recognized from the start. Monopolistic control of the airwaves and, hence, control of the thoughts and political direction of the people were greatly feared. During discussions in 1926 regarding the type of legislation needed, Herbert Hoover, who was then Secretary of Commerce, voiced this concern: "It can not be thought that any single person or group shall ever have the right to determine what communication

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[1]THE COMPLETE JAMES MADISON 346 (S.K. Padover ed. 1953).

[2]*See generally* P. SANDMAN, D. RUBIN, & D. SACHSMAN, MEDIA 135 (2d ed. 1976).

[3]U.S. CONST. amend. I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

may be made to the American people."[4] Debate over regulation of the broadcast media resulted in enactment of the Radio Act of 1927,[5] and with advancing technology and the introduction of television, adoption of the Communications Act of 1934.[6] The 1934 Act serves as the governing law of the electronic media today.

Recently, there have been major moves to enact new communications legislation. A comprehensive revision of the 1934 Act, H.R. 13015, was introduced in the second session of the 95th Congress,[7] but died in committee when Congress adjourned. When the 96th Congress began, proposed communications legislation, in the form of S. 611[8] and S. 622,[9] was introduced in the Senate. H.R. 3333,[10] a revised version of the earlier H.R. 13015, was later introduced in the House.

The 1934 Act gave rise to an extensive body of law interpreting, limiting, and expanding the language of the Act. This Note will focus on the political broadcasting regulations of the 1934 Act, and in particular on the "equal opportunities" doctrine embodied in section 315, which requires that equal opportunities for the use of broadcast facilities be provided for all legally qualified candidates for a public office when facilities are provided for one.[11] The existing

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[4]H.R. REP. NO. 464, 69th Cong., 1st Sess. 11 (1926).

[5]Radio Act of 1927, ch. 169, 44 Stat. 1162 [hereinafter cited as Radio Act of 1927].

[6]Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified in scattered sections of 47 U.S.C.) [hereinafter cited as Communications Act of 1934].

[7]1 *The Communications Act of 1978: Hearings on H.R. 13015 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. 2 (1978) [hereinafter cited as *H.R. 13015*].

[8]S. 611, 96th Cong., 1st Sess. (1979).

[9]S. 622, 96th Cong., 1st Sess. (1979).

[10]H.R. 3333, 96th Cong., 1st Sess. (1979).

[11]To satisfy the requirement that an equal opportunity be granted, it is necessary that upon use of the facilities by a qualified candidate and a request for the exercise of § 315 rights by an opponent, a licensee make available an equal length of time of the same "desirability," or audience potential, as the first candidate received. Primer on Political Broadcasting and Cablecasting, 43 RAD. REG. 2d (P & F) 1353, 1383 (1978) [hereinafter cited as 1978 Primer]. The time provided does not necessarily have to be on the same day or program, or even at the same time of day, if there is approximately equal audience potential as determined in good faith by the broadcaster. *Id.* Another situation requiring the licensee's good faith comes to the forefront when technical problems occur. Senator Birch Bayh lost a portion of a television appearance as a result of temporary video difficulties and complained to the FCC that this denied him equal opportunity. It appeared, though, that the licensee did everything possible to restore the video portion and that audio was undamaged throughout the broadcast. Because the station had "substantially complied" and had acted in good faith, Senator Bayh's appeal for additional time was denied. Senator Birch Bayh, 15 F.C.C.2d 47 (1968). Finally, the concept of equal opportunity applies only to the use of a station by a candidate personally, whether the "user" or the "requester," and does not extend to use by those speaking on his behalf. Felix v. Westinghouse Radio Stations, Inc., 186 F.2d 1 (3d Cir. 1950), *cert. denied*, 341 U.S. 909 (1951).

law in this and several related areas will be analyzed, the impact of the proposals now before Congress and the prospects for revision assessed, and reactions to the proposed bills by industry leaders emphasized.

The Federal Communications Commission (FCC or Commission)[12] has recognized the importance of this area: "[T]he presentation of political broadcasting, while only one of the many elements of service to the public . . . is an important facet, deserving the licensee's closest attention, because of the contribution broadcasting can thus make to an informed electorate—in turn so vital to the proper functioning of our Republic."[13]

In the early 1970's, approximately ninety-seven percent of all households in the United States had a television set and close to ninety-nine percent owned at least one radio.[14] In a climate of this nature, where market saturation of the electronic media is nearing one hundred percent, it is important for politicians to pay strict attention to the new directions broadcast law could take with the adoption of untried, untested legislation. The imminence of the 1980 gubernatorial and senatorial races for Indiana, as well as the 1980 presidential race, make it equally important for broadcasters, their attorneys, and the public alike to scrutinize the proposed legislation particularly because a bill, even of the magnitude of H.R. 3333 or one of the two Senate bills, could be enacted in time to play a critical role in the campaign plans of candidates for the 1980 elections.

II. General Legislative History of Section 315

The original legislation intended to govern "voice" broadcasters was the Radio Act of 1927.[15] It established the Federal Radio Commission (FRC) as the administrative agency for regulation of the airwaves through a system of granting licenses to qualified applicants who were bound to act in the public convenience, interest, and necessity.[16] The technology of the 1920's limited the number of frequencies available for broadcasting. At the time the Radio Act was enacted, approximately 500 licensees were in operation[17] compared

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[12]The Commission is the administrative agency charged with the enforcement of the Communications Act. The seven-person board replaced the earlier five-person Federal Radio Commission. The initial function of the FCC was basically that of allocating airwaves and preventing interference. P. Sandman, D. Rubin, & D. Sachsman, *supra* note 2, at 66.

[13]1978 Primer, *supra* note 11, at 1355 (quoting Licensee Responsibility as to Political Broadcasts, 15 F.C.C.2d 94 (1968)).

[14]T. Klein & F. Danzig, How to be Heard 303-04 (1974).

[15]Radio Act of 1927, *supra* note 5.

[16]*Id.* §§ 3-4.

[17]67 Cong. Rec. 12503 (1926) (statement of Senator Howell).

to 8,476 radio and 1,158 television stations today.[18] The limitation on frequencies was most often cited as the justification for distinguishing this new medium, radio, from the various print media for purposes of regulation and control. In the 1926 Congressional debates over the proposed bill, Senator Howell of Nebraska stated:

> [R]adio affords such a unique facility of publicity that one has to think very carefully lest he go astray, thinking of newspapers and reasoning by analogy. This vehicle for publicity is entirely different from any other with which we are familiar. We have tens of thousands of newspapers, magazines, and other publications, but there is now from necessity, and will be hereafter, only a limited number of radio stations.[19]

The Communications Act of 1934 was introduced in the 73d Congress when it became clear that more comprehensive legislation was needed because technology was advancing in giant leaps, particularly in the field of television, and this Act was subsequently adopted.[20]

The equal opportunities clause, section 18 of the Radio Act, was originally designed to prevent unequal treatment among candidates by partisan broadcasters and was included in section 315(a) of the 1934 Act.[21] The clause remained unchanged until 1959, when Congress amended the provision to allow four exemptions.[22] In its present form, section 315(a) reads:

> If any licensee shall permit any person who is a legally

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[18]BROADCASTING, Apr. 9, 1979, at 84. These statistics, reported by the FCC, were current on Feb. 28, 1979.

[19]67 CONG. REC. 12503 (1926).

[20]Communications Act of 1934, *supra* note 6.

[21]Section 315 began in the 72d Congress as H.R. 7716 and, as passed by both Houses, differed from § 18 of the Radio Act. Section 18 provided a right of equal opportunity for use of a broadcast facility *only* to candidates for public office. *See* Radio Act of 1927, *supra* note 5. H.R. 7716 would have extended the privilege to a candidate's supporters as well:

> [A]nd if any licensee shall permit any person to use a broadcasting station in support of or in opposition to any candidate for public office . . . he shall afford equal opportunity to an equal number of other persons to use such station in support of an opposing candidate for such public office . . . .

76 CONG. REC. 3768 (1933). This bill, however, was the object of a pocket veto by President Coolidge and did not become law. When the Communications Act of 1934 was introduced in the second session of the 73d Congress, both Houses agreed to omit the language previously proposed in H.R. 7716 and vetoed by the President, and the bill passed in that form. For a more complete discussion of the above legislative history, see Felix v. Westinghouse Radio Stations, Inc., 186 F.2d 1 (3d Cir. 1950), *cert. denied*, 341 U.S. 909 (1951).

[22]Act of Sept. 14, 1959, Pub. L. No. 86-274, 73 Stat. 557 (codified at 47 U.S.C. § 315(a) (1976)).

> qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
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> (1) bona fide newscast,
> (2) bona fide news interview,
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.[23]

The latter part of section 315(a), beginning with "Nothing in the foregoing . . . ," is commonly known as the fairness doctrine—a term which is often and erroneously used interchangeably with the equal opportunities doctrine. They are easily distinguished—the fairness doctrine operates in a much looser framework, requiring only that stations present opposing views on issues of public importance. Equal opportunities, on the other hand, relies more upon explicit mathematical calculations for determining the amount of broadcast time to which a candidate is entitled when the section is triggered by a prior use of another candidate.[24] The fairness doctrine imposes

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[23]47 U.S.C. § 315(a) (1976).

[24]The equal opportunities doctrine is also frequently referred to as "equal time," and many sources use the terms interchangeably. *See, e.g.*, H. NELSON & D. TEETER, LAW OF MASS COMMUNICATIONS 491 (2d ed. 1973). The FCC, however, has indicated that it considers this term incorrect because furnishing equivalent *duration* of time is not necessarily the same as furnishing an equal opportunity. As an example, five minutes of prime time, which is traditionally the evening hours, would reach significantly more persons than five minutes in mid-morning. 1978 Primer, *supra* note 11, at 1381.

some obligations on political broadcasting in general, however, and will be discussed briefly in subsequent sections.

III. Effect of the House Proposals on Political Broadcasting

The undertaking to enact new comprehensive communications legislation officially began when the Communications Act of 1978, H.R. 13015,[25] was unveiled by its cosponsors, California Democrat Lionel Van Deerlin, chairman of the House Communications Subcommittee of the Committee on Interstate and Foreign Commerce, and the subcommittee's ranking Republican, Florida Congressman Lou Frey. The bill was hailed by some as a significant improvement over the existing law, and criticized by others as disguising the possibility of severe governmental control in some areas by promises of deregulation in other areas.[26] Despite the "death" of the bill when the 95th Congress adjourned while the proposal was still in committee, H.R. 13015 performed an important function. It caught the attention of legislators, administrators, and broadcast industry leaders, all of whom gave it serious consideration and comment, as demonstrated by the reactions of their representatives at the hearings on the bill.[27] These reactions served as guidelines for the subcommittee and are reflected in the current formulation, H.R. 3333.[28]

H.R. 3333, known as the Communications Act of 1979, was also sponsored by Congressman Van Deerlin, along with cosponsors James Collins of Texas, now the ranking Republican on the subcommittee, and North Carolina Congressman James Broyhill. Of all the proposed legislation, this bill is by far the most far-reaching, involving the most drastic deviations from the 1934 Act. H.R. 3333 therefore deserves close attention, particularly in light of Congressman Van Deerlin's position that "[t]here isn't going to be another [draft] . . . . This is the one that's going to move."[29]

A. Equal Opportunities and H.R. 3333

The equal opportunity doctrine was retained in section 463 of H.R. 3333, but in significantly different form from section 315. As introduced, section 463 reads:

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[25]*H.R. 13015, supra* note 7.

[26]*See, e.g.*, text accompanying notes 132-47 *infra.*

[27]*See generally* 3 *The Communications Act of 1978: Hearings on H.R. 13015 Before The Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. (1978) [hereinafter cited as *1978 Hearings*].

[28]H.R. 3333, 96th Cong., 1st Sess. (1979).

[29]*Rewrite II more radical than its predecessor*, Broadcasting, Apr. 2, 1979, at 29.

(a)(1) If any television broadcast station licensee permits any person who is a legally qualified candidate for public office to use any television broadcast station operated by such licensee through the purchase of broadcast time made available by such station, then such licensee shall afford equal opportunities for the use of such station through the purchase of broadcast time to all other such candidates for the office involved.

(2) Such television broadcasting station licensee shall have no control over the content or format of any material broadcast under the provisions of this section.

(b) The provisions of this section shall not be construed to impose any obligation or requirement upon any television broadcasting station licensee to allow the use of such station by any legally qualified candidate for public office.[30]

Section 463 would clearly change the area of political broadcasting in many respects. Most notable is the complete elimination of radio broadcasting from the obligation to provide equal opportunities.[31] Section 315(a) of the existing law applies to *any licensee* allowing a candidate to use that licensee's broadcast facilities. The wording clearly encompasses both radio and television broadcast stations, since both are licensees of the FCC. Proposed section 463(a)(1), on the other hand, specifically makes its provisions applicable only to any *television* broadcasting station licensee who allows a candidate to use its *television* broadcasting station.

The problem of classification as a legally qualified candidate is probably intended to be resolved under the proposed section in much the same manner as under the current provision. The language used is the same—"a legally qualified candidate for any public office"[32]—with the exception of the word "any," which is deleted from section 463.[33] Arguably, then, the current state of the

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[30]H.R. 3333, 96th Cong., 1st Sess. § 463 (1979).

[31]*Id.* (by negative implication).

[32]47 U.S.C. § 315 (1976).

[33]H.R. 3333, 96th Cong., 1st Sess. § 463(b) (1979). The elimination of the word "any" is perhaps explained as being a remnant of the earlier H.R. 13015, § 439(a)(1)(B), which specifically exempted the offices of President, Vice-President, Senator, and any others for which the election was statewide. *H.R. 13015*, *supra* note 7, at 98. The practical effect of that provision was to limit the application of the doctrine to local candidates and members of the House of Representatives who could be classified as "legally qualified candidates" only, which made the use of "any public office" inappropriate. The provision exempting these offices was deleted in § 463; therefore, the same justification does not exist for excluding "any" from the statutory language. Thus, the slight difference in wording between § 315 and § 463 does not appear to indicate that differing interpretations are needed.

law governing classification as a legally qualified candidate, as it has been interpreted under the 1934 Act, is applicable as well to section 463.

1. Who Is a "Legally Qualified Candidate for Public Office?"—Early in 1978, the Commission proposed a rule revising the definition of a legally qualified candidate.[34] The commissioners cited three basic deficiencies in the existing rule warranting the adoption of the amendments as corrective measures: 1) Certain candidates were not fully covered, leaving open the determination of when candidates who were running for nomination in a manner other than in a public election became legally qualified; 2) ballot candidates were inherently discriminated against in favor of write-in candidates—write-in could qualify much earlier than ballot candidates, thereby gaining an advantage, merely by publicly committing himself to seeking election by the write-in method and proceeding accordingly; and 3) no special criteria were included regarding qualifications for nomination for President or Vice-President of the United States.[35] The new revised rule went into effect on August 28, 1978, and reads, in pertinent part:

> (a) *Definitions.* (1) A legally qualified candidate for public office is any person who:
>
> (i) Has publicly announced his or her intention to run for nomination or office;
>
> (ii) Is qualified under the applicable local, state or federal law to hold the office for which he or she is a candidate; and,
>
> (iii) Has met the qualifications set forth in either subparagraphs (a)(2), (3), or (4), below.
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> (2) A person seeking election to any public office including that of President or Vice President of the United States, or nomination for any public office except that of

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[34]Amendment of Parts 73 and 76 of the Commission's Rules Relating to Broadcasts and Cablecasts by Legally Qualified Candidates for Public Office, 67 F.C.C.2d 956 (1978). Under the Commission rules existing before the amendment, as codified in 47 C.F.R. §§ 73.120, .290, .590, & .657 (1975), a legally qualified candidate was defined as

> any person who has publicly announced that he or she is a candidate for nomination by a convention of a political party or for nomination or election in a primary, special or general election, municipal, county, State or national, and who meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate, so that he may be voted for by the electorate directly or by means of delegates or electors, and who either: (1) Has qualified for a place on the ballot, or (2) Has publicly committed himself to seeking election by the write-in method, and is eligible under the applicable law to be voted for by sticker, by writing in his name on the ballot, or other method; and makes a substantial showing that he is a bona fide candidate for nomination or office.

[35]67 F.C.C.2d at 956-57.

> President or Vice President, by means of a primary, general or special election, shall be considered a legally qualified candidate if, in addition to meeting the criteria set forth in subparagraph (a)(1) above, that person:
>
> (i) Has qualified for a place on the ballot, or
>
> (ii) Has publicly committed himself or herself to seeking election by the write-in method and is eligible under applicable law to be voted for by sticker, by writing in his or her name on the ballot or by other method, and makes a substantial showing that he or she is a bona fide candidate for nomination or office.[36]

The first requirement under paragraph (a)(1)(i) concerning public announcement, which is not a departure from the earlier rule, means just that—the candidate must state the intention to run publicly.[37] Filing petitions with or obtaining certification from the applicable state in order to be placed on the ballot will serve as the equivalent of the public announcement.[38] The FCC has held that the definition would be unworkable without this restriction, particularly in the case of an incumbent, where a broadcaster might be forced to decide the point at which an incumbent's activities, such as speeches and attendance at public functions, "indicate" that he will seek reelection.[39]

Paragraph (a)(1)(ii), regarding eligibility to hold the office being sought, represents an important advantage from the broadcaster's point of view. To the broadcaster, the saying "time is money" is especially true. Providing an unqualified candidate access to media time at the special rates permitted for qualified candidates[40] is inequitable not only to the licensee and other candidates but to the public as well, which is entitled to a *sound* basis for decision-making.

Paragraph (a)(1)(iii) states that a candidate must also satisfy requirements (2), (3), and (4) of the rule. Subparagraph (2)(ii), suggested by the FCC in its Notice of March 16, was designed to rectify the problem under the old rule of a difference in the period of time before an election during which write-in and ballot candidates were considered legally qualified.[41] The Commission sought to insert language to the effect that write-in candidates would become legally

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[36]Broadcasts by Candidates for Public Office, 47 C.F.R. § 73.1940 (1978).

[37]1978 Primer, *supra* note 11, at 1365.

[38]*Id.*

[39]Senator Eugene J. McCarthy, 11 F.C.C.2d 511, 513-15, *aff'd*, 390 F.2d 471 (D.C. Cir. 1968).

[40]47 U.S.C. § 315(b) (1976). This section allows a qualified candidate to avail himself of a privilege known as the "lowest unit charge." *See* text accompanying note 79 *infra*.

[41]67 F.C.C.2d at 958.

qualified only at the time any other contender in the race would be eligible to qualify for the ballot.[42] In its final form, however,[43] the language of subparagraph (2)(ii) remained effectively the same as the prior subparagraph (2)[44] because the corrective language was deleted. Thus, a write-in candidate qualifying under new subparagraph (2)(ii) apparently still has a better chance of buying more media time than ballot candidates. For example, stations that might hesitate to make time available to a candidate in an attempt to avoid an equal opportunities request from other candidates will have no such worries with the write-in candidate who qualifies before ballot candidates, for *both* the person receiving time and the one requesting it must be legally qualified *at the time of the use* of the broadcast facility. At the point that such a write-in candidate requested time, no other ballot candidates would be "legally qualified."[45]

Requirement (3), according to the Commission, is to remedy the problem left open under the old definition of determining when a candidate who is seeking nomination in a manner other than a primary, general, or special election becomes qualified.[46] Paragraph (a)(3) reads:

> A person seeking nomination to any public office except that of President or Vice President of the United States, by means of a convention, caucus or similar procedure, shall be considered a legally qualified candidate if, in addition to meeting the requirements set forth in paragraph (a)(1) above, that person makes a substantial showing that he or she is a bona fide candidate for such nomination: Except, That no person shall be considered a legally qualified candidate for nomination by the means set forth in this paragraph prior to

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[42]The particular language intended to provide a solution to the dilemma read: "[N]o person shall be considered a legally qualified write-in candidate prior to the time that candidates for the same nomination or office are able, under applicable local, state or federal law, to qualify for a place on the ballot." *Id.* at 957.

[43]47 C.F.R. § 73.1940 (1978).

[44]In fact, the sole difference between the earlier provision and the 1978 clause is the addition of the phrases "himself or herself" and "his or her name" in place of the terms "himself" and "his."

[45]This assumes, of course, that there were no other qualified write-ins. McCarthy v. FCC, 390 F.2d 471 (D.C. Cir.), *aff'g* 11 F.C.C.2d 511 (1968). It is important to note that the Commission's rules place the burden of proving status as a legally qualified candidate on the person seeking the equal opportunities: "A candidate requesting equal opportunities of the licensee, or complaining of noncompliance to the Commission shall have the burden of proving that he and his opponent are legally qualified candidates for the same public office." 47 C.F.R. § 73.1940(f) (1978).

[46]67 F.C.C.2d at 958.

> 90 days before the beginning of the convention, caucus or similar procedure in which he or she seeks nomination.[47]

This provision establishes a clear standard which rectifies the problem with the prior rule. It places the group of candidates seeking nomination by alternate means, such as conventions and caucuses, on similar footing with all others by requiring compliance with paragraph (a)(1), and by imposing a time limitation similar to the limitations placed on ballot candidates under subparagraph (2).

The final problem addressed by the Commission regarding lack of criteria for determining bona fide candidacy for presidential or vice-presidential nomination, was solved with the adoption of subparagraph (4).[48] The provision in subparagraph (4) which states generally that any candidate satisfying the rule's stipulations in at least ten states will be considered legally qualified in all the states of the United States was not originally intended by the Commission. The Commission favored, instead, nationwide standing as a legally qualified candidate upon ballot qualification for presidential or vice-presidential nomination in *one* state.[49] This was an attempt to incorporate a declaratory ruling of the FCC that a person qualifying for a party's nomination for President in one state must be considered a legally qualified candidate in *all* states.[50] Qualification by nomination in one state, however, was opposed by the National Association of Broadcasters (NAB), the broadcast industry's representative organization. In response to the Commission Notice of March 16, the NAB filed comments with the FCC generally supporting the attempts to make the definition more workable, but opposing the

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[47]47 C.F.R. § 73.1940(a)(3) (1978).

[48]Subparagraph (4) now states:

> A person seeking nomination for the office of President or Vice President of the United States shall, for the purposes of the Communications Act and the rules thereunder, be considered a legally qualified candidate only in those States or territories (or the District of Columbia) in which, in addition to meeting the requirements set forth in paragraph (a)(1) of this section—
>
> (i) He or she, or proposed delegates on his or her behalf, have qualified for the primary or Presidential preference ballot in that State, territory or the District of Columbia, or
>
> (ii) He or she has made a substantial showing of bona fide candidacy for such nomination in that State, territory or the District of Columbia; Except, that any such person meeting the requirements set forth in paragraph (a) (1) and (4) in at least ten States (or nine and the District of Columbia) shall be considered a legally qualified candidate for nomination in all States, territories and the District of Columbia for purposes of this act.

47 C.F.R. § 73.1940(a)(4) (1978).

[49]67 F.C.C.2d at 959.

[50]Walt Disney Prods., Inc., 33 F.C.C.2d 297, 299 (1972), *aff'd sub nom.* Paulsen v. FCC, 491 F.2d 887, 892 (9th Cir. 1974).

"one-state" clause, stating that while localized political activities were important, they should not automatically entitle a candidate to nationwide status.[51] As the rule stands, qualification by nomination in one state will not confer nationwide status as a legally qualified candidate on an individual.

A final clause of note embodied in the new definition is subparagraph (5),[52] in which the Commission defined and gave examples of conditions which would satisfy the term "substantial showing" of bona fide candidacy. Briefly, "substantial showing" means "evidence that the person claiming to be a candidate has engaged to a substantial degree in activities commonly associated with political campaigning."[53] Examples of such activities would be campaign speeches, distribution of campaign literature, issuance of press releases, and maintenance of a campaign committee and headquarters.[54] The language of proposed section 463 leads to the conclusion that no changes in the definition of a legally qualified candidate were intended. Therefore, the interpretation and application of the new definition of a legally qualified candidate under the 1934 Act remain important considerations despite the potential adoption of H.R. 3333.

2. What Constitutes a "Use" of a Broadcast Facility?—Considering further changes in the equal opportunities doctrine as proposed by section 463, the most potentially troublesome area is the definition of a "use" of a broadcast facility for purposes of the section. Both section 315 of the existing law and proposed section 463 employ the word in the general sense that any licensee who permits

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[51]National Association of Broadcasters, Broadcasting and Government 1978: A Mid-Year Status Report 21 (June 1978) (published report prepared by the government relations and legal departments of the NAB for distribution to the membership).

[52]47 C.F.R. § 73.1940(a)(5) (1978).

[53]*Id.*

[54]*Id.* As indicated by the statute, this list is not exhaustive, and not all of the listed activities are necessary to satisfy the "substantial showing" requirement. The provision, however, clarifies the definition of a legally qualified candidate. The FCC has also recognized two situations in which one is *not* a legally qualified candidate. The first involves rulings by a state official with authority to declare whether a candidate is qualified for the ballot. A licensee is permitted to rely on the declaration of such an official that a candidate is unqualified unless there has been a judicial decision to the contrary. Lester Posner, 15 F.C.C.2d 807 (1968); Socialist Workers Party, 40 F.C.C. 280 (1956). The second instance involves the Federal Election Campaign Act (FECA) definition of a political candidate, 2 U.S.C. § 431(b), and whether a person qualifying under its terms is a legally qualified candidate for purposes of § 315 of the Communications Act. The unequivocal answer of the FCC has been that only the FCC definition applies. The FECA definition is specifically limited to its own Act; thus, it does not affect the definition in § 315. Anthony R. Martin-Trigona, 67 F.C.C.2d 33, 34 (1977). *See also* Federal Election Campaign Amendments of 1974, 55 F.C.C.2d 279, 33 RAD. REG. 2d (P & F) 1679 (1975).

a qualified candidate to use the broadcast facility will be subject to the equal opportunity requirements.[55]

The term "use," employed in the general sense, could reasonably be interpreted to have the same definition in the new section as it does in the current section because the word appears in the same context in both. Therefore, under section 463, "use" is likely to take on the exact meaning which has been construed in section 315. In general, then, any broadcast in which a candidate appears through voice or picture, if he can be identified by members of the audience, will be a "use."[56] Even appearances of a non-political nature are uses. Thus, when Ronald Reagan was campaigning for the Republican nomination for President in the 1976 election, stations were advised that any showing of a movie in which he appeared or of reruns of his earlier television series would entitle other candidates to equal opportunities for the use.[57]

From the earliest days of the doctrine, through case-by-case interpretation, the term took on the meaning set out in the Commission's 1956 *Letter to Kenneth E. Spangler.*[58] In that case, a candidate who was also an announcer on television sought a determination of whether his appearances as part of his employment would give rise to equal opportunities. The FCC answered that "all appearances of a candidate, no matter how brief or perfunctory are a 'use' of a station's facilities within section 315."[59] An exception to this strict and fairly inflexible standard was made where an incumbent president was concerned. President Eisenhower, then a candidate for re-election, received network time to speak to the nation on the Suez crisis without incurring equal opportunity obligations.[60] The Commission classified as exempt any reports of the President which dealt with specific, current, and extraordinary international events.[61]

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[55]*See* notes 23 & 30 *supra* and accompanying text.

[56]NATIONAL ASSOCIATION OF BROADCASTERS, POLITICAL BROADCAST CATECHISM 6-7 (8th ed. 1976).

[57]N.Y. Times, Nov. 21, 1975, at 22, col. 3 (remarks of Milton Gross, the FCC's expert on political fairness doctrine questions).

[58]40 F.C.C. 279, 14 RAD. REG. (P & F) 1226b (1956).

[59]*Id.*

[60]Public Notice 38387, 40 F.C.C. 276, 14 RAD. REG. (P & F) 720 (1956).

[61]*Id.* at 277. A similar situation arose when incumbent President Johnson was campaigning for election. He went on the air to inform the nation of a change in Soviet leadership and of the explosion of a nuclear device by Communist China. Again the Commission, citing the Suez case, found the use exempt and went even further, stating: "[W]e think that the networks could reasonably conclude that statements setting forth the foreign policy of this country by its chief executive in his official capacity constitute *news* in the statutory sense. Simply stated, they are an act of office . . . ." Republican Nat'l Comm., 40 F.C.C. 408, 410, 3 RAD. REG. 2d (P & F) 647 (1964) (emphasis added). This puts the factual situation squarely within the area contemplated by the on-the-spot coverage of bona fide news events exemption.

The FCC further relaxed the doctrine by holding that coverage of a newsworthy event on a regular newscast, including a brief display of candidates, was not a use.[62] However, the standard was tightened shortly thereafter by the infamous Lar Daly decision.[63] Lar Daly, a persistent candidate for public office in Chicago, was running for nomination on both the Republican and Democratic tickets. He complained that he was denied an equal opportunity in response to certain news film clips in which his opponents, Richard J. Daley and Timothy Sheehan, appeared. The Commission held unanimously that most of the film clips were uses entitling Lar Daly to the benefits of the statutes,[64] and over heavy objections from broadcasters, denied the petitions for reconsideration and affirmed the ruling.[65] The Attorney General of the United States filed a brief with the FCC against the ruling, voicing the fear that if appearances of candidates in regular news programs were "uses," it could bar "all direct news coverage of important campaign developments."[66]

In spite of the trauma evoked by the ruling, it led to the most significant developments in the history of the doctrine. Congressional reaction was swift; within three days of the ruling, work was begun which led to adoption of four exemptions to section 315[67]—for appearances on bona fide newscasts,[68] bona fide news interviews,[69] bona fide news documentaries,[70] and on-the-spot coverage of bona fide news events.[71]

The exemptions to classification as a "use" create the most difficult questions in interpreting section 463 of the proposed law. The four exceptions in section 315, so swiftly added by Congress, are conspicuously absent in the proposed legislation. Instead, the language specifies that only through the *purchase* by an opponent of broadcast time may a candidate avail himself of section 463, and even then he can only do so by *purchasing* the equivalent broadcast time.[72] This represents a substantial difference from both section 315

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[62]Allen H. Blondy, 40 F.C.C. 284, 285 (1957).

[63]Columbia Broadcasting Sys., Inc., 18 RAD. REG. (P & F) 238, *aff'd*, 26 F.C.C. 715, 18 RAD. REG. (P & F) 701 (1959).

[64]*Id.*

[65]26 F.C.C. at 751.

[66]*Id.* at 723.

[67]Act of Sept. 14, 1959, Pub. L. No. 86-274, 73 Stat. 557 (codified at 47 U.S.C. § 315(a) (1976)). *See* text accompanying notes 22 and 23 *supra*.

[68]47 U.S.C. § 315(a)(1) (1976). For the text of § 315(a)(1), see text accompanying note 23 *supra*. For a discussion of this exception, see text accompanying notes 90-118 *infra*.

[69]47 U.S.C. § 315(a)(2).

[70]*Id.* § 315(a)(3).

[71]*Id.* § 315(a)(4).

[72]H.R. 3333, 96th Cong., 1st Sess. (1979).

of the existing law and section 439 of H.R. 13015, for neither categorically distinguishes paid time from free time. The provision, if adopted, would enlarge the number of appearances which would not give rise to equal opportunities obligations. Proposed section 463 would effectively encompass all the section 315 exemptions because they involve situations in which money does not usually change hands. Section 463 would extend even further because programs which do not specifically qualify for exemptions under section 315, such as newscasts which are not bona fide, would be exempt under section 463 if the time during which the candidate appeared was not purchased.

It is conceivable that the drafters of the bill were seeking to avoid some of the difficulties encountered with the section 315 exemptions. Disputes over application of the exemptions have made this the most highly litigated area of political broadcasting, as well as one of the most unpredictable. Therefore, the absence of the specific exemption language and the proposal of a new test—purchase of time—can be construed reasonably as an attempt to simplify application of the doctrine for both candidates and broadcasters. Such an interpretation would be consistent with the overall scheme in section 463 of eliminating or reducing regulation.[73]

Thus, the adoption of section 463 would significantly alter the definition of a "use" of a broadcast facility. The standard which has developed under the 1934 Act—that all identifiable appearances of a candidate are uses unless specifically exempted by section 315—would be wholly replaced by the proposed purchase test. Under section 463, the only pertinent question would be whether television broadcast time was exchanged for money.

B. Related Areas of Political Broadcasting and H.R. 3333

1. Reasonable Access.—The reasonable access doctrine is another area which would be changed by adoption of H.R. 3333. Section 312(a)(7) of the existing law, known as the "reasonable access" clause, reads:

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[73]The § 463 "purchase" test seems to represent an advantage over section 439, the corresponding provision in H.R. 13015. Section 439 would have dispensed with the § 315 exemptions and replaced them with an exemption for "coverage of a news event." *H.R. 13015, supra* note 7, at § 439. These words leave much room for speculation. Again, the drafters were probably attempting to simplify the provision, consistent with the overall deregulatory scheme, yet the language may be so broad that the legislative intent is thwarted. The term "news event" would seem to encompass everything from newscasts, news documentaries, and news interviews to on-the-spot coverage of news events. In other words, there was room in the section 439 language to read in all current exemptions. Also, the language was likely broad enough for new exemptions. Rather than simplifying the situation for candidates and broadcasters, then, it would have enlarged the considerations without enunciating a straightforward test, such as the exchange of money, by which to judge each situation.

> The commission may revoke any station license or construction permit—
>
> (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.[74]

This is the only requirement which obligates the licensee to allow a candidate access to the media. Section 315 becomes important once the *first* candidate is given broadcast time, but it does not mandate that a broadcaster make time available to that first candidate.[75] Section 312 represents an exception by requiring that reasonable access always be made available to federal candidates. The test of whether a licensee has met the section 312 stipulation, as in many other areas of broadcasting law, is one of reasonableness and good faith.[76] The Commission recently initiated a study of how well the section was working,[77] and, based upon the results, reaffirmed the rule of reasonableness.[78] On the other hand, proposed section 463(b), which is similar to the language used in section 315(a), makes it clear that a licensee has no obligation to make his facilities available to any candidate. The difference, however, is that no provision similar to section 312(a)(7) requiring reasonable access exists elsewhere in the bill, so that proposed section 463(b) arguably takes on new weight and meaning. Unlike section 315(a), it *really* means that the licensee is not obligated to provide time.

2. Lowest Unit Charge.—Another change of consequence in the proposed communications legislation is found in this area. The rates which a station may charge a candidate for any time purchased are governed by section 315(b) of the 1934 Act, which limits the fee to the "lowest unit charge" of the station during the forty-five days preceding a primary and the sixty days preceding an election.[79]

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[74]47 U.S.C. § 312(a)(7) (1976).

[75]Charles Furcolo, 48 F.C.C.2d 565, 31 RAD. REG. 2d (P & F) 195 (1974); Lew Breyer, 31 F.C.C.2d 548 (1968).

[76]Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 34 F.C.C.2d 510, 23 RAD. REG. 2d (P & F) 1901 (1972). In general, time does not have to be provided free, and a licensee may be relieved of the rule if the number of federal candidates is so great that it would impose a hardship to require access for them all. *Id.* at 535, 23 RAD. REG. 2d (P & F) at 1917.

[77]Notice of Inquiry Ordered Regarding Possible Issuance of Guidelines by FCC for Political Candidates and Broadcast Licensees Concerning "Reasonable Access" Provisions of Section 312(a)(7), 67 F.C.C.2d 1098 (1978).

[78]1978 Primer, *supra* note 11, at 1395 (citing FCC Report and Order Docket No. 78-102, July 12, 1978).

[79]47 U.S.C. § 315(b) (1976):

> The charges made for the use of any broadcasting station by any person

Lowest unit charge requires that candidates be allowed all discounts which are offered to the station's most preferred commercial clients for the same class and amount of time, for the same period, regardless of whether the candidate would otherwise be eligible for those discounts. This is usually established by a station's published rate card, but if there is a current and outstanding *actual* charge which is lower than the published rate, the actual will govern.[80]

All mention of rates to be charged candidates is excluded from the rewritten Act. Thus, broadcasters would have discretion to charge any amount to any candidate. The high cost of media advertising is already prohibitive for many minor party candidates, effectively precluding them from acquiring the mass exposure available to major party candidates with better funding.[81] The elimination of the lowest unit charge could compound the financial difficulties of minor parties as well as hinder the campaigns of major candidates whose resources, while greater, are still limited.

3. The Fairness Doctrine.—The fairness doctrine, also embodied in section 315, does not require equal time in the sense that the equal opportunities doctrine does. Instead, the fairness doctrine requires reasonable opportunities for the presentation of contrasting views when one side of a controversial issue has been broadcast. Application of the doctrine to political broadcasting is evident in the area of non-uses and exempt uses, because it applies to situations where the candidate's supporters appear rather than the candidate himself and to exempt news coverage of candidates.[82] In these situations, the licensee must always be certain that his treatment of issues and persons has been equitable in all respects.

The fairness doctrine also has special application to the political situation where supporters of a candidate purchase time and appear on the air. An opponent's supporters can then buy equal time even

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who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed—

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof.

[80]1978 Primer, *supra* note 11, at 1390. For a further discussion of "lowest unit charge" issues, see 34 F.C.C.2d 510, 23 RAD. REG. 2d (P & F) 1901 (1972).

[81]*See* Note, *Keeping Third Parties Minor: Political Party Access to Broadcasting*, 12 IND. L. REV. 713, 721-23 (1979).

[82]Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act (First Fairness Report), 36 F.C.C.2d 40, 47, 24 RAD. REG. 2d (P & F) 1925-26 (1972). *See also* Gloria W. Sage, 62 F.C.C.2d 135, 136, 38 RAD. REG. 2d (P & F) 425, 426 (1976).

though this doctrine does not usually require equality in time, just fairness in treatment.[83] This quasi-equal opportunities situation has become known as the "Zapple doctrine," and has contributed to the widespread confusion of the fairness doctrine with the equal opportunities provisions. The fairness doctrine was eliminated from H.R. 13015, but a substitute was provided in section 434(a) and was to be known as the "equity principle."[84] The only significant difference between the fairness doctrine and the equity principle was that, like proposed section 463, the equity principle would be applied only to television. Thus, it was possible that the fairness doctrine, as it relates to political television broadcasting, would have lived on through the equity principle of H.R. 13015. Section 434(a), then, was a change in name rather than a change in substance. When H.R. 3333 was drafted, this factor was considered and the fairness doctrine was completely restated under its own name in section 462(2).[85] Thus, adoption of section 462(2) would retain all the current areas of the fairness doctrine as related to political broadcasting, including the Zapple doctrine.

IV. Effect of the Senate Proposals on Political Broadcasting

Shortly after the House Communications Subcommittee introduced H.R. 13015, the Senate Communications Subcommittee of the Committee on Commerce, Science, and Transportation announced an intention to enter the arena.[86] The Senate subcommittee chairman, Ernest Hollings, indicated that he was not in favor of a complete revision of the 1934 Act and said, instead, that "[t]he '34 Act should not be packed off to a nursing home. . . . But it must be *renovated* to meet a new age."[87] The bill introduced in the 96th Congress by Senators Ernest Hollings, Howard Cannon, and Ted Stevens, S. 611,[88] reflects this attitude and seeks only to amend the 1934 Act. Senator Barry Goldwater, the ranking Republican on the subcommitee, along with Senator Harrison Schmitt, introduced S. 622,[89] another proposed revision which, again, seeks only to amend the Act of 1934.

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[83]*See* Nicholas Zapple, 23 F.C.C.2d 707, 19 Rad. Reg. 2d (P & F) 421 (1970).

[84]*H.R. 13015, supra* note 7.

[85]H.R. 3333, 96th Cong., 1st Sess. (1979).

[86]*Seed of rewrite may be sprouting on Senate side,* Broadcasting, Oct. 16, 1978, at 22.

[87]*Id.*

[88]S. 611, 96th Cong., 1st Sess. (1979).

[89]S. 622, 96th Cong., 1st Sess. (1979).

A. Equal Opportunities and S. 611, S. 622

Neither of these bills greatly affects political broadcasting, including the equal opportunities doctrine under section 315. Since section 315 is not amended by either Senate proposal, it would remain in full force should either of these bills be enacted. Because the current interpretation of the section 315 exemptions is an important factor in understanding all of the ramifications of eventual adoption of either S. 611 or S. 622 or any potential advantages of H.R. 3333, an examination of the current state of the law is warranted.

Congress clearly wanted to give the Commission considerable discretion in interpreting the exemptions. A 1959 Senate report stated: "[T]he committee in adopting the language of the proposed legislation carefully gave the Federal Communications Commission full flexibility and complete discretion to examine the facts in each complaint which may be filed with the Commission . . . ."[90] Thus, case by case, the Commission has described each exemption, while trying to balance the interests of concerned parties. Broadcasters seek to have any appearances they carry fall within an exemption to avoid statutory obligations, minority party candidates fight an incessant battle to have appearances of major candidates declared non-exempt so they may receive equal media time, and major party candidates, predictably, attempt to have their own appearances exempt and have their opponent's appearances declared non-exempt.

1. Bona Fide Newscast: Section 315(a)(1).—Broadly speaking, this provision has been interpreted to grant an exemption to any appearance falling within a newscast or news program.[91] This has been called the most justified of the exemptions by one writer, who points out that since a candidate has no editorial control over which portions of an "event" a broadcaster will air, that candidate will be greatly disadvantaged should an opposing candidate be granted the opportunity to receive equal media time which could be put to a much better use because he would retain editorial control.[92]

This exemption does not appear to be absolute. If it can be shown that a licensee acted in bad faith, for example, devoting a length of time to the candidate that was out of proportion to the length of the newscast and the significance of the news event, the exception will not apply.[93] In addition to the good faith of the licensee, other factors to consider in determining the standing of the

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[90]S. REP. NO. 562, 86th Cong., 1st Sess. 12 (1959).

[91]1978 Primer, *supra* note 11, at 1375.

[92]Note, *Equal Opportunity in Political Broadcasting: A Dying Ideal*, 8 SW. U.L. REV. 991, 1008 (1976).

[93]H.R. REP. NO. 802, 86th Cong., 1st Sess. 6 (1959).

program as a newscast are whether it is regularly scheduled and whether it consistently emphasizes news and current events.[94]

2. Bona Fide News Interview: Section 315(a)(2).—The guiding principle of this exemption is whether the news interview takes place on a bona fide news program or a bona fide news interview broadcast. If either, the appearance will be an exempt use.[95] Factors which appear to be of particular relevance in finding an exemption under this subsection are: 1) Retention of complete editorial control by the licensee such that a good faith judgment of an individual's newsworthiness is within the scope of the broadcaster's discretion;[96] 2) demonstration that the program is regularly scheduled;[97] and 3) evidence that the program's format is one which is typically concerned with news-type information and events on a recurring basis, which would include appearances by newsworthy figures of the time.[98] The clearest illustration of programs which are exempt as opposed to ones which are not can be offered by considering National Broadcasting Corporation's (NBC) popular programming in *The Today Show*, *The Tonight Show*, and *The Tomorrow Show*. *The Today Show* has been ruled exempt as a news program, with the consequence that all news interviews contained therein will receive the same treatment because it is regularly scheduled and emphasizes news, current events, and public affairs.[99] *The Tonight Show* was very clearly declared non-exempt because the network classified the program as a *variety* show.[100] The fact that newsworthy guests frequently appeared did not alter the basic nature and format of the program.[101] *The Tomorrow Show* presented a more difficult question because it had a stronger history of featuring newsworthy individuals. However, the fact that "newsworthiness" was not

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[94]Problems have arisen in this area regarding the newscaster-turned-candidate. The Commission has indicated that any fact situation involving a newscaster identified by name will be a use notwithstanding the candidate's status as an employee. Use of Station by Newscaster Candidate for Public Office Subject to Section 315, 40 F.C.C. 433 (1965). If the voice or appearance is not identifiable to the public, however, it will not generally be a use. WENR, 17 F.C.C.2d 613 (1969). To avoid this problem completely, a station can often obtain a waiver from the opposing candidates who agree in return to settle for a certain amount of time. As long as the employee-turned-candidate refrains from mentioning his candidacy during the appearance and the opponents sign the waivers with full knowledge of all the facts, the Commission generally finds the waivers binding. WBTW-TV, 5 F.C.C.2d 479, 480 (1966).

[95]1978 Primer, *supra* note 11, at 1376.

[96]*Id.*

[97]*Id.*

[98]*Id.*

[99]Broadcast Actions (Lar Daly), 40 F.C.C. 314 (1960). CBS's *60 Minutes* also has been declared exempt on similar grounds. Letter to CBS, 58 F.C.C.2d 601, 602, 36 RAD. REG. 2d (P & F) 381, 382 (1976).

[100]40 F.C.C. at 314.

[101]*Id.*

necessarily the basis of the selection, for example, guests had included strippers and handwriting analysts, made this a non-exempt program.[102]

3. Bona Fide News Documentary: Section 315(a)(3).—The documentary exemption is a less frequently litigated area under the doctrine. As originally described by Congress, the standard to be applied was an "incidental to" test, meaning coverage of a news event of contemporary news value in which a candidate's appearance was incidental to the subject matter.[103]

The elements which categorize a documentary as exempt were well-stated in *Victor E. Ferrall, Jr.*[104] The list includes but is not limited to

> 1) [W]hether the appearance of the candidate is incidental to the presentation of the subject; 2) whether or not the program is designed to aid or advance the candidate's campaign; 3) whether the appearance of the candidate was initiated by the licensee on the basis of the licensee's bona fide news judgment that the appearance is in aid of the coverage of the subject matter; and 4) whether the candidate has any control over the format, production, or subject matter of the broadcast.[105]

4. On-the-Spot Coverage of Bona Fide News Events: Section 315(a)(4).—Political conventions and all activities incidental thereto are exempt by the specific language of the statute.[106] Two other types of events, however, the debate and the press conference—both of which are normal and predictable occurrences of any campaign—are not specifically exempted. As a result, questions concerning treatment of these for purposes of section 315(a) provided fertile ground for extensive litigation.

In 1962, the Commission ruled first in *The Goodwill Station, Inc.*,[107] and immediately thereafter in *National Broadcasting Co.*,[108] that the broadcast of a debate would engender equal opportunity obligations. The Commission relied heavily on the legislative history of the doctrine which showed that in 1959 Congress had rejected

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[102]Socialist Workers Party, 65 F.C.C.2d 234, 38 RAD. REG. 2d (P & F) 943 (1976).

[103]*See* 105 CONG. REC. 14441 (1959).

[104]46 F.C.C.2d 1113, 1114 (1974) (where appearances of several candidates on a documentary were the result of their expertise in the area, and not for the purpose of advancing their individual candidacies, the documentary was termed bona fide, and hence, exempt).

[105]*Id.*

[106]47 U.S.C. § 315(a)(4) (1976).

[107]40 F.C.C. 362, 365 (1962).

[108]40 F.C.C. 370, 373 (1962).

versions of the bill which attempted to exclude debates from the requirements.[109] In *Columbia Broadcasting System, Inc.*,[110] press conferences were deemed non-exempt and held not to fall within the category of news events which could be covered "on-the-spot."[111]

The law remained settled until 1975, when the Aspen Institute, an independent broadcasting watchdog agency, and CBS obtained a decision which overruled in whole or in part these earlier cases.[112] The standard established was that debates between qualified political candidates initiated under the auspices of nonbroadcast entities, as well as candidate's press conferences, would be exempt from equal opportunities, provided they were covered live and in their entirety, based upon the good faith determination of licensees that they were bona fide news events of contemporary importance, and there was no evidence of station favoritism.[113] This position was later affirmed in *Chisholm v. F.C.C.*,[114] where the Court of Appeals of the District of Columbia found no basis for disturbing the FCC's action because the action was reasonable.[115] As of today, the rule has been extended only slightly to allow for some time delay in the broadcast of either of these events, rather than having to be aired "live."[116]

For events less directly related to the campaign itself than conventions, debates, and news conferences, an Indiana case typifies a situation intended to fall within the exemption. In *Thomas R. Fadell*,[117] a candidate was an incumbent judge who appeared on a weekly program, *Gary County Court on the Air*, which had been

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[109]*Id.* at 372.

[110]40 F.C.C. 395 (1964).

[111]*Id.* at 398.

[112]Aspen Inst. Program on Communications and Soc'y, 55 F.C.C.2d 697, 35 RAD. REG. 2d (P & F) 49 (1975).

[113]*Id.* at 703, 35 RAD. REG. 2d (P & F) at 56.

[114]538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976), *aff'g* Aspen Inst. Program on Communications and Soc'y, 55 F.C.C.2d 697, 35 RAD. REG. 2d (P & F) 49 (1975).

[115]538 F.2d at 364. For an excellent discussion of the development of the press conference and debate exemptions through the *Aspen* and *Chisholm* decisions see Note, *Communications Law—Equal Time Exemptions Expanded: Candidates' Debates and Press Conferences Granted Exemption: Chisholm v. F.C.C.*, 10 CONN. L. REV. 236 (1977).

[116]Delaware Broadcasting Co. (WILM), 60 F.C.C.2d 1030, 38 RAD. REG. 2d (P & F) 831 (1976). The Commission felt that this modification of *Chisholm* was warranted because different time zones make live broadcasts at times convenient for all citizens impossible. A standard for evaluating any delay was propounded: "[W]e must consider the length of the delay as a factor in determining the broadcaster's reasonableness and good faith. Thus, absent unusual circumstances, a delay of more than a day would raise questions concerning whether the broadcast was 'on-the-spot coverage of bona fide news events.'" *Id.* at 1032-33, 38 RAD. REG. 2d at 834. *See* Dr. John F. Donato, 67 F.C.C.2d 140 (1977) (delay in broadcast from July 1 to July 3, 1977, was unreasonable).

[117]40 F.C.C. 380, 25 RAD. REG. (P & F) 288 (1963).

broadcast for fourteen years. The Commission held that the appearance or "use" fell directly under the exemption because: 1) The program was bona fide by virtue of having been on air for fourteen years, 2) the candidate's appearance was not for the purpose of advancing his candidacy, and 3) the licensee had exercised a good faith judgment that it was a newsworthy event.[118]

B. Related Areas of Political Broadcasting and S. 611, S. 622

Other areas of political broadcasting would not be greatly altered by either S. 611 or S. 622. Lowest unit rate, section 315(b), and reasonable access, section 312(a)(7), would both be unchanged by the proposals. The fairness doctrine is also not amended by S. 611, with the only break in this pattern of retaining prior political broadcasting law being the specific elimination of the fairness doctrine as it applies to radio in section 333(a)(2) of S. 622.[119]

V. General Reactions to the Proposed Legislation

Political broadcasting law can be perplexing and troublesome. It is plagued by the inescapable fact that competing interests exist. Broadcasters view it as an annual bane and legislators, some with their own campaigns in mind, jealously guard their rights under the law. Only by understanding the competing forces at work in a given area can a rational attempt be made to analyze any suggested changes. The full significance of H.R. 3333, in particular section 463, and of S. 611 and S. 622, is not yet known. Therefore, particular attention should be given to the responses of the various interest groups affected by the legislation, for they may be the ones who will gain most by effective regulation and lose the most by enactment of unsatisfactory statutes.

Because of the recent introduction in Congress of the pending legislation, hearings on the bills had not been held at the time of this writing. However, extensive hearings were held on H.R. 13015,[120] and the statements made by those testifying represent recent reflections and expectations about political broadcasting in general and the directions which they desire new legislation to take.

A. Federal Communications Commission

The House subcommittee on Communications held hearings on the broadcasting aspects of H.R. 13015 September 11-22, 1978.[121] At

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[118] *Id.* at 381.

[119] S. 622, 96th Cong., 1st Sess. (1979).

[120] *1978 Hearings, supra* note 27.

[121] *Id.*

the time of the hearings, several of the commissioners expressed their convictions concerning the equal opportunity requirements. Chairman Charles Ferris opposed any changes in the treatment of political candidates.[122] He stated that "the present regulatory scheme is designed to foster the widest possible dissemination of information about candidates and campaigns."[123] In his opinion, the existing Act strikes a balance between the desire of candidates to conduct their campaigns in their own manner and the need of broadcasters to maintain editorial control over news coverage of political campaigns. He further stated that in abolishing the equal opportunities doctrine for radio, the fairness doctrine, lowest unit charge, and the section 312(a)(7) reasonable access requirement, H.R. 13015 "goes too far in upsetting this balance."[124] Thus, it can be inferred from these statements that the H.R. 3333 treatment of the equal opportunities doctrine would be as displeasing to Chairman Ferris as the related section in H.R. 13015, and that either S. 611 or S. 622, by keeping the equal opportunity requirements, would be preferred in that respect over H.R. 3333.

Abbott M. Washburn, FCC Commissioner, was generally opposed to the deregulation terms, favoring retention of the equal opportunities provision for both radio and television, although he indicated some approval for the exemption of the offices of President and Vice President.[125] Commissioner Washburn, it appears, would also prefer the Senate bills over the House version as far as equal opportunity is concerned, due to the retention of section 315 in the former.

Commissioner Margita White, on the other hand, reiterated her support of H.R. 13015's "overall deregulatory thrust."[126] Her statements at the hearings regarding equal opportunities were consistent with this approval of deregulation, and expressed dissatisfaction with some of the retained requirements. White pointed out that as section 439(c) of H.R. 13015 reads, exempt coverage of a news event would probably require the broadcaster's role to be one of "observer and reporter rather than promoter or participant,"[127] and as such, important programs such as *Meet the Press* would no longer be exempt. Absent a total repeal of the section, she would require equal opportunities whenever broadcast time was sold or pro-

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[122] *Id.* at 94 (statement of Charles D. Ferris, Chairman of FCC).

[123] *Id.*

[124] *Id.*

[125] *Id.* at 152 (statement of Abbott M. Washburn, FCC Commissioner).

[126] *Id.* at 154 (statement of Margita White, FCC Commissioner). White is no longer an FCC Commissioner. She left the position in early 1979.

[127] *Id.* at 160.

vided to a candidate to use as he saw fit, but would exempt all appearances over which the broadcaster retained editorial control.[128]

H.R. 3333, as the most sweeping renovation of equal opportunities—including complete repeal of the doctrine as far as radio is concerned—would likely be the preferred equal opportunities legislation of White.

James Quello, FCC Commissioner, espoused views similar to White's, and urged that Congress "[u]nequivocally remove all first amendment and regulatory constraints,"[129] in order to bring broadcasters to the same position, subject to the same responsibilities, as their "major competitor and closest cousin—newspaper."[130] He clearly wanted equal opportunities provisions for television as well as radio to be deleted in subsequent versions of the Bill. Commissioner Quello, therefore, would also probably opt for the H.R. 3333 regulation of equal opportunity.

Commissioners Joseph Fogarty and Tyrone Brown, like Ferris and Washburn, advocated retention of regulation and the fairness doctrine.[131] Neither mentioned the equal opportunities clause, but their particular opposition to deregulation where "fairness" is concerned strongly implies a preference for leaving section 315(a) as it currently stands.

Thus, most members of the agency now charged with enforcement of the statute appear to be dissatisfied with attempted changes in the equal opportunities doctrine. Some members of the Commission would be happier if the doctrine became extinct altogether, but more would prefer it in the old form, section 315.

B. Industry

The National Association of Broadcasters was represented at the H.R. 13015 hearings by a panel which reflected, generally, approval of the attempts to regulate the broadcast area less strictly. The policy of the NAB has long been that section 315 should be repealed entirely,[132] and the position taken by the panel was indicative of this view. With reference to radio, the comment was made that "[i]t is encouraging to think that under this bill the election season will no longer be a period to be dreaded . . . . We will be able to choose how we participate in the democratic process, just as

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[128] *Id.*

[129] *Id.* at 482 (statement of James H. Quello, FCC Commissioner).

[130] *Id.*

[131] *Id.* at 345, 347-48 (statements of FCC Commissioners Joseph R. Fogarty and Tyrone Brown).

[132] Interview with George Gray, Special Representative for NAB Governmental Relations, in Washington, D.C. (Dec. 20, 1978).

a newspaper chooses today."[133] The NAB's only expressed displeasure with section 439 of H.R. 13015 was that television was not treated similarly.[134]

The NAB later maintained, however, that the "coverage of a news event" exemption language[135] was vague and uncertain as to whether the intent was to cover all the specific exemptions enumerated under the old Act.[136] It suggested to the subcommittee that some interpretation and clarification was needed.[137] Thus, the NAB should be pleased with the replacement of the problem language in section 439(c) with the "purchase" test of section 463, and should also be pleased that the area of exempt appearances would be enlarged under the "purchase" test.

Other industry responses reflect the same appreciation of the intent for deregulation behind section 439. Gene Jankowski, president of the CBS Broadcast Group, addressing the subcommittee on equal opportunity and the fairness doctrine, said he was "pleased that the rewrite goes a long way toward releasing broadcasters from the restraints on their proper journalistic functions."[138] Senior vice president and general counsel for the American Broadcasting Company, Inc. (ABC), Everett Erlick, said that along with the suspension of equal opportunity for presidential and vice-presidental candidates, he favors a trial suspension for all other candidates as well.[139] This, in his opinion, "would provide broadcasters with greater freedom and flexibility in campaign coverage and would benefit the public by permitting more effective and comprehensive presentation of major candidates and important issues."[140] Once again, it appears that the House subcommittee in drafting H.R. 3333 reacted to these opinions by making the equal opportunities requirements in section 463 less stringent for broadcasters. The Senate, however, appears to have taken little notice of the broadcaster's position by leaving section 315 intact.

C. Citizens Groups

Reverend Everett C. Parker, director of the United Church of Christ Office of Communication, called the H.R. 13015 proposals "a

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[133] *1978 Hearings*, *supra* note 27, at 183 (statement of Walter E. May, NAB panel member).

[134] *Id.* at 181 (statement of Donald A. Thurston, NAB panel member).

[135] The exemption language appears in *H.R. 13015*, *supra* note 7, § 439(c).

[136] *1978 Hearings*, *supra* note 27 (supplementary statement of the NAB, at 25).

[137] *Id.*

[138] *1978 Hearings*, *supra* note 27, at 362 (statement of Gene Jankowski).

[139] *Id.* at 577 (statement of Everett Erlick).

[140] *Id.* at 577-78.

disgrace."[141] He alleged that "[t]hey intend a bigger giveaway of public rights and property than Teapot Dome. They will perpetuate entrenched monopolies in violation of the principle that the airwaves belong to the people."[142]

A recent statement by Sam Simon, executive director of the National Citizens Committee for Broadcasting, indicates that H.R. 3333 will not solve the problems of H.R. 13015. He commented that H.R. 3333, from his group's point of view, is "more contrary to the public interest than the first bill."[143]

Nolan Bowie, director of the Citizens Communication Committee, a law firm active in protecting public broadcast rights, adamantly rejected H.R. 13015 as an "anticivil rights bill."[144] In view of his overall condemnation of the deregulatory tone of the legislation as not being designed to protect or serve any public interest, it can be assumed that the repeal of *any* portion of section 315 is contrary to his group's wishes. Therefore, S. 611 or S. 622 would be more likely to receive his support than H.R. 3333. He was concerned that the inability to regulate would open the door for blatant discrimination, and was particularly concerned with the impact on minorities.[145]

D. Minorities

Pluria Marshall, chairman of the National Black Media Coalition, echoed Mr. Bowie's concern that H.R. 13015 was against minority interests.[146] Marshall pointed out that black employment in the media had risen from three percent to nine percent since 1969, and also stressed the increase in black media ownership.[147] He contended that none of this would have been possible under the new bill. Again, the equal opportunities rules were not directly discussed, but the implication seems to be that broadcasters would not conduct themselves properly in the political sphere as well without regulation.

VI. Discussion

The effect of the adoption of either S. 611 or S. 622 in their present forms would be simply to preserve the status quo with regard to political broadcasting. Section 315 would be retained with all the ad-

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[141] *At first blush: no panic in the industry street*, Broadcasting, June 12, 1978, at 41.

[142] *Id.*

[143] *Rewrite II more radical than its predecessor*, Broadcasting, Apr. 2, 1979, at 32.

[144] *1978 Hearings*, *supra* note 27, at 379 (statement of Nolan Bowie).

[145] *Id.* at 380-81.

[146] *Id.* at 391-92 (statement of Pluria Marshall).

[147] *Id.* at 394.

vantages of a developed body of case law. It would, of course, be retained with all its disadvantages, primarily the often complex interpretation of the exemption language. These advantages and disadvantages must be contrasted with whatever value would attach to the enactment of section 463 of the House version, a significantly different approach to the entire area of equal opportunities.

Strong reasons exist for approving section 463 of H.R. 3333. Strongest of all is the position taken by some that the existing law, section 315, and all similar regulatory provisions violate the first amendment guarantee of freedom of the press, and that section 463, with its partial deregulation, would lessen this violation.[148] Broadcasters challenged the equal opportunity provision on constitutional grounds as early as 1959, when it was argued that abridgement of the right could only be condoned where there was an overwhelming justification in the public interest.[149] The FCC found that justifying public interest existed and expressed it in an argument which has withstood twenty years of attacks on its constitutionality. The FCC stated:

> We fully recognize that freedom of the radio is included among the freedoms protected against government abridgement by the first amendment. . . . But this does not mean that the freedom of the people as a whole to enjoy the maximum possible utilization of this medium of mass communication may be subordinated to the freedom of any single person to exploit the medium for his own private interest. . . . Any regulation of radio, especially a system of limited licensees, is in a real sense an abridgement of the inherent freedom of persons to express themselves by means of radio communications. It is, however, a necessary and constitutional abridgement in order to prevent chaotic interference from destroying the great potential of this medium for public enlightenment and entertainment. . . . The most significant meaning of freedom of the radio is the right of the American people to listen to this great medium of communications free from any governmental dictation as to what they can or cannot hear and free alike from similar restraints by private licensees.[150]

Despite the great weight given this argument, the battle continues, and broadcasters staunchly contend they should have all the constitutional freedoms of the print media.[151] The most forceful argu-

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[148]*See, e.g., id.* at 484 (statement of James H. Quello, FCC Commissioner).

[149]Columbia Broadcasting Sys., Inc., 26 F.C.C. at 721-22.

[150]*Id.* at 745-46.

[151]*See generally 1978 Hearings, supra* note 27, at 183 (statements of members of the NAB panel).

ment that section 315 and section 463, as it would apply to television, are unconstitutional is the "deterrence effect" position. This position, stated generally, is that anything which works to deter coverage of an issue important to the American public has only a slightly less critical impact on first amendment rights than a direct ban. As recognized by Henry Geller, Assistant Secretary of the United States Department of Commerce, often the only way a broadcaster knows he has interpreted the law incorrectly is *after* an agency or court proceeding finds against him.[152] He referred to this as the "chilling effect."[153] The practical result is that all too often licensees find it easier to deny all candidate requests for time than to worry about creating potentially troublesome situations under equal opportunities law.[154] In this way, the broadcasters contend section 315 is self-defeating and, perhaps, unconstitutional.

On this issue, both the arguments pro and con have some merit. Although the courts have consistently rejected all first amendment attacks, whatever the eventual resolution, section 463, by placing no restrictions on the radio industry, lessens the potential for first amendment conflicts as viewed by broadcasters. In this respect, section 463 would represent an advantage over its earlier counterpart.

Another advantage of the new section is apparent from the results of statistical studies conducted between 1959 and 1976 by The Roper Organization, Inc.,[155] which have shown that in the 1976 elections people acquired seventy-five percent of their information about candidates running at the national level from television, as opposed to four percent from radio.[156] At the state and local levels, television also held a convincing lead, providing fifty-three percent of the knowledge about state candidates and thirty-four percent for local, as opposed to radio's five and seven percent, respectively.[157] These statistics provide a viable reason for distinguishing television's treatment from that of radio—while the candidate's right to be heard and the public's right to hear him on radio is as important as the right to be heard on television, the potential for harm is not as great because fewer people rely on radio for their information. Therefore, insufficient "justifying public interest" for abridging the first amendment would be shown as to radio and the

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[152] *Id.* at 4.

[153] *Id.* at 5.

[154] Comment, *The Quadrennial Problem: Application of the Equal Opportunity and Fairness Doctrines to Political Campaigns*, 1976 DET. C.L. REV. 83, 91.

[155] THE ROPER ORGANIZATION, INC., CHANGING PUBLIC ATTITUDES TOWARD TELEVISION AND OTHER MASS MEDIA 1959-1976 (1977).

[156] *Id.* at 9.

[157] *Id.* at 8.

section 463 language could be said to reflect this progressive view, which would be more equitable for the broadcaster than section 315.[158]

Another justification for approving section 463 is that, in part, the reason behind the original legislation no longer exists. It is generally accepted that the controlling reason for enactment of the Act of 1934 was the supposed limited nature of the airwaves.[159] The cosponsor of the new bill, Congressman Van Deerlin, indicated that the rejection of this position was one of the purposes behind the drafting of parts of the 1978 proposal. He endorsed deregulation of radio

> on the well established ground that the number of radio stations in the United States is now equal to the number of weekly newspapers and the scarcity element that existed at the time the 1934 Act was written no longer applies. . . . For television . . . we recognize that a scarcity factor does still exist.[160]

While the advantages of the new legislation are indisputable, they must be weighed against the disadvantages. The most critical disadvantage is the possibility that rights of minority groups—including minor political parties—will not be protected.[161] Within the present law, if a broadcaster is not equitable in his treatment of any person or group, or defies the equal opportunities obligations, sanctions are available. These include fines and imprisonment,[162] and in extreme circumstances, revocation of the station's license to operate.[163] Under section 463, radio would have no requirements to meet and therefore, quite obviously, no sanction could be imposed. None of the penalties in other parts of the Act were intended to extend to this area. Even though it is unlikely that radio broadcasters would, as a group, ignore the needs of minority organizations, such groups are understandably wary of a law which provides no statutory protection against the flagrant abuser. The ef-

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[158]It should be noted again that broadcasters as yet do not view it in this way. Herbert Hobler, an industry representative, has urged the position that "unless the Fairness Doctrine and equal time law are eliminated, there will be continuing erosion of First Amendment freedoms. . . . [They] not only inhibit the broadcaster but more importantly actually deny the American public their right to diversity of opinion over the airwaves!" NAB HIGHLIGHTS, June 12, 1978, at 2.

[159]H. NELSON & D. TEETER, LAW OF MASS COMMUNICATIONS 487 (2d ed. 1973).

[160]*And it is from the basement to the attic*, BROADCASTING, June 12, 1978, at 29.

[161]For a discussion of how broadcasters have treated minor party candidates for office, see Note, *Keeping Third Parties Minor: Political Party Access to Broadcasting*, 12 Ind. L. Rev. 713, 723-33 (1979).

[162]47 U.S.C. § 501 (1976).

[163]*Id.* § 312(a).

fect of this deficiency, which makes continued discrimination possible, is especially serious because radio is generally more accessible than television to the minority candidate, who may not have the financial resources of a major party candidate.[164]

An answer to the anxieties of this group of individuals might be that, while there is no *statutory* deterrent for misuse, there is a built-in protection in the system. As Commissioner Quello indicated in his statements to the House subcommittee, the print media has risen to the task of informing the electorate of pertinent campaign matters without government interference, and there is no valid reason for supposing that broadcast journalists will not do the same.[165] Indeed, the ability to remain "fair" is built into the system: A station cannot be too partisan and remain healthy economically because of the lost revenue from the non-favored sectors. The success of a partisan broadcaster would be contingent on the solvency of favored groups. Not only is such partiality bad journalism, but it is bad business judgment as well.

Therefore, while the fears of the minorities are not entirely unfounded, there is good reason to believe that in most instances all persons would be treated equitably under section 463. In addition, in the absence of the "deterrent effect" of the existing section 315, minorities and others might henceforth find the media even more available to meet their needs.

VII. Conclusion

There are reasons, as in any revamping of a major federal act, to approach the Communications Act of 1979 and the two Senate proposals with caution. Several factors are at work, and at present the far-ranging consequences of all the provisions have yet to be fully examined. How the two committees will interact and forge their separate proposals into coherent provisions remains to be seen, but Congressman Van Deerlin has stated his belief that "[e]nactment of landmark legislation is possible in the 96th Congress."[166] Others are not so sure. It has been said that "[g]iven the many substantial interests that undoubtedly will mount a highly organized opposition to all or critically related parts of H.R. 13015, passage of the legislation in anything approaching its present form seems unlikely, at least for

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[164]For an interesting discussion of the effects of media costs on minority candidates, see Note, *Equal Opportunity in Political Broadcasting: A Dying Ideal*, 8 Sw. U.L. Rev. 991, 1008 (1976).

[165]*1978 Hearings*, *supra* note 27, at 488 (statement of Commissioner James H. Quello).

[166]*Seed of rewrite may be sprouting on Senate side*, Broadcasting, Oct. 16, 1978, at 22.

a number of years."[167] This doubt would of course extend to H.R. 3333 as well.

Political broadcasting has flourished in the last forty years under the Communications Act of 1934, reacting continuously to the climate of the time. An extensive but workable body of law has developed through interpretation and application. While advantages undeniably exist in the new proposal, the only certainty regarding section 463 of the Communication Act of 1979 is that it would practically abandon forty-four years of carefully worked out precedent and a new series of proceedings and litigation would begin from scratch. Therefore, many industry members, concerned citizens, and FCC commissioners alike have reached the same conclusion as Senator Hollings and recommend "a creative blending of the Communications Act of 1934 with the most constructive provisions of H.R. 13015."[168] FCC Commissioner Washburn most aptly expressed this sentiment:

> [S]ome currency has been given to the idea that a drastic overhaul of communications regulation is necessary simply because the 1934 act is 44 years old. The U.S. Constitution was ratified in 1788. It is 190 years old and has been flexible enough to accommodate the enormous changes in this country.
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> . . . .
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> It is, therefore, inappropriate and inaccurate to depict the 1934 act as a creaky antique.[169]

LYNNE M. MCMAHAN

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[167]Communciations Act Rewrite (June 27, 1978) (an analysis of H.R. 13015 produced by the law office of Hogan & Hartson, a leading communications law firm).

[168]NAB HIGHLIGHTS, July 10, 1978, at 1.

[169]*1978 Hearings*, *supra* note 27, at 153 (statement of Commissioner Abbott M. Washburn).

Life Insurance Conditional Receipts in Indiana

I. Introduction

During the course of the sale of a life insurance policy, the applicant, the insurance agent, and the life insurance company face an initial period of uncertainty. Once the applicant and agent agree that the applicant should purchase a policy, several questions arise. Will the insurance company issue the policy or reject the application? If the policy is issued, will it be issued at standard rates or at a higher premium? How long will it take for the company to make its decision? To resolve some of this uncertainty, many life insurance companies authorize their agents to collect from the applicant a sum equal to the first premium and to deliver to him a conditional receipt.[1]

The use of conditional receipts removes some of the uncertainty and confers some benefits on all parties to the transaction. The applicant receives assurance that the company will grant immediate coverage, at least on a limited basis. The agent receives the applicant's money, from which the agent's commissions are ultimately derived, as well as the psychological advantage that the applicant, having parted with his money, is less likely to rescind the transaction. The company obtains generally the same advantage as the agent, but the company is also faced with the possibility that the agent, either innocently or otherwise, may have bound the company on a risk it would not have wanted to accept. For this reason, companies usually try to word their conditional receipts so that the coverage granted is sufficiently limited to enable the company to

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[1]A conditional receipt is customarily a separate and independent contract or agreement entered into between the company and the applicant for insurance under the terms and provisions of which, upon stated conditions, one of which is that the applicant has paid a certain portion of his premium upon making the application, the coverage applied for is deemed to be in force as of the time of completion of the application (and where a medical examination is required, after signing of the medical part of the application), rather than as of the time the policy is issued or delivered. Usually this agreement is printed on the application itself and is printed on the receipt that the soliciting agent delivers to the applicant when the premium, or a portion thereof, is paid.
Crowe, *Conditional Receipts—Life, Accident, and Health Insurance*, in ABA Insurance, Negligence & Compensation Law Section 52, 53 (1965). *See also* Fortunato, *Conditional Receipts: Should the Uninsurable Have Insurance?*, Forum, April 1966, at 5.

rescind the transaction if it determines that the applicant is an unacceptable risk.[2]

Courts applying Indiana law have only recently confronted the question of how limited the coverage provided by conditional receipts may be. In 1976, the Indiana Court of Appeals decided *Kaiser v. National Farmers Union Life Insurance Co.*[3] and *Monumental Life Insurance Co. v. Hakey,*[4] and in 1978, a federal district court decided *Meding v. Prudential Insurance Co. of America.*[5] These cases may suggest an erroneous trend in Indiana law.

II. Kaiser and Its Antecedents

The facts in *Kaiser* describe the beginning of a typical life insurance transaction. Thomas Kaiser had applied for a term life insurance policy on May 17, 1969. At the time the application was made, Kaiser had paid the first quarterly premium and received a conditional receipt from the agent; however, on June 30, this original application was supplanted by another application for whole life insurance.[6] Kaiser had tendered an additional premium with this new application so that the two payments equalled the amount of the quarterly premium for a whole life policy. Kaiser had taken the required medical examination on July 11, and the company had received the medical examination report on July 14. On July 20, Kaiser died in an automobile accident. At the time of Kaiser's death

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[2]The advantages of the use of conditional receipts are enumerated in Crowe's article:

> (1) [The applicant] may eliminate the possibility that he will become disqualified for the insurance after the time the application is completed and before the policy is issued or delivered; and (2) if he qualifies for the insurance applied for, and is insurable, he has coverage from the time the application is completed and the premium paid, and can eliminate the risk to himself of being without insurance during the period of time from completion of [the] application to issuance or delivery of [the] policy.
>
> The benefits to the companies are: (1) Collection of the premium eliminates the loss which would otherwise result from the expense of solicitation, underwriting, and issuing the policy where the premium is not collected and the policy is not taken; and (2) there is a sales advantage in the agent's ability to include the conditional coverage benefit in making his sales presentation.
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> But certainly, the benefits derived from using the conditional receipt device run to the life proposed as well as to the company.

Crowe, *supra* note 1, at 54.

[3]339 N.E.2d 599 (Ind. Ct. App. 1976).

[4]354 N.E.2d 333 (Ind. Ct. App. 1976).

[5]444 F. Supp. 634 (N.D. Ind. 1978).

[6]The insurance agent had determined that, because Kaiser was only 20 years old, he was ineligible for term life insurance according to company rules. 339 N.E.2d at 600.

the company had neither accepted nor rejected the application. According to the appellate court's summary of the trial court's findings, the company had failed to act because it was still "attempting to obtain additional information to determine [Kaiser's] insurability."[7]

According to the court's summary of the facts, the conditional receipt given to Kaiser provided that "insurance coverage under the policy would be effective as of a specified date provided that defendant was satisfied that on such date the applicant was an insurable risk under the company's rules for the type of policy applied for."[8] This language supports the company's argument that the applicant's insurability was a condition precedent to the company's liability; that is, the insurance would be effective on the date specified in the conditional receipt if, and only if, the applicant was an insurable risk on that date.[9] Nevertheless, the court observed that the condition precedent construction had not always been applied to similar language in conditional receipts:

> [C]ourts have interpreted conditional receipts as creating a temporary or interim contract for insurance subject to a condition subsequent—rejection of the application by the company. Where rejection does not occur, in the case of life insurance, prior to the death of the applicant, the company is liable for the stated amount of proceeds.[10]

Recognizing that this problem was one of first impression in Indiana,[11] the court drew heavily upon an Indiana case dealing with industrial insurance, *Western & Southern Life Insurance Co. v. Vale*,[12] and upon decisions in Nevada and Kansas, *Prudential Insurance Co. of America v. Lamme*[13] and *Service v. Pyramid Life Insurance Co.*,[14] respectively. After quoting extensively from these three cases, the *Kaiser* court drew the following conclusions:

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[7] *Id.*

[8] *Id.*

[9] *See* note 34 *infra* and accompanying text. *See also* Annot., 2 A.L.R.2d 943, 986-87 (1948); Fortunato, *supra* note 1, at 8. The other type of receipt now in use is the "approval" receipt, which states that coverage is in effect only after the company has *approved* the application. *See* note 33 *infra* and accompanying text. *See also* Annot., 2 A.L.R.2d 943, 961 (1948); Fortunato, *supra* note 1, at 8. The A.L.R. Annotation indicates that the approval receipt was more common at the time that the Annotation was written. Annot., 2 A.L.R.2d 943, 946 (1948). It is questionable now whether the approval or insurability receipt is more common.

[10] 339 N.E.2d at 601.

[11] *Id.* at 602.

[12] 213 Ind. 601, 12 N.E.2d 350 (1938).

[13] 83 Nev. 146, 425 P.2d 346 (1967).

[14] 201 Kan. 196, 440 P.2d 944 (1968).

> Where, as in the case at bar, a receipt is issued by a life insurer and the receipt is supported by consideration, a contract is created. Any conditions contained in the receipt are to be treated as conditions subsequent thereby compelling an insurer to act affirmatively or negatively on the application. Moreover, where an applicant is not acceptable, he must be notified and the premium returned. An insurer cannot terminate the risk so assumed unless the applicant is so notified in his lifetime.[15]

The condition precedent theory allows insurers who use the "insurability"[16] receipt to avoid liability on uninsurable risks. In a case in which the applicant dies before the company can reject the application, the company can continue its investigation to determine if the applicant was insurable[17] at the time the receipt was given. If the applicant is found to have been insurable, the condition precedent would be satisfied and the contract completed. If he is found not to have been insurable, the condition would not be met and no contract would have been formed. The *Kaiser* decision takes this protection away from the insurer. The condition subsequent theory means that the contract is formed as of the date specified in the receipt. As a result, the company may find itself bound on an unacceptable risk with insufficient opportunity to reject the application before the death of the applicant.

Prudential Insurance Co. of America v. Lamme,[18] which *Kaiser* relied upon, arose out of a similar set of facts. Prudential Insurance Company had received Part I of the application from Richard Lamme requesting $25,000 of life insurance. The company had accepted $52.64, which amounted to the first quarterly premium for the policy, and had given a conditional receipt to him which stated in part:

> If the required and completed Part I and the required and completed Part II of the application and such other information as may be required by the Company are received by the Company at one of its Home Offices, and if the Company

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[15]339 N.E.2d at 604.

[16]*See* text accompanying note 34 *infra*.

[17]Insurability can be an elusive concept, but as Dean Frandsen points out, courts have recognized it: "'Insurability as a term of art signifies all those physical and moral factors reasonably taken into consideration by life insurance companies in determining coverage or matters affecting the risk.'" Frandsen, *Insurance, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 243, 256 n.61 (1976) (quoting Rosenbloom v. New York Life Ins. Co., 65 F. Supp. 692, 696 (W.D. Mo. 1946)).

[18]83 Nev. 146, 425 P.2d 346 (1967).

> after the receipt thereof determines to its satisfaction that the proposed insured was insurable on the later of the dates of said Parts I and II . . . .[19]

Richard Lamme died of a heart attack seven weeks after Part I of the application had been submitted to the company but before he had taken a medical examination which would have been Part II of the application.

The court, recognizing that the condition of insurability had been a significant factor in similar cases, stated: "[M]ost courts have found the insurance company liable to the beneficiary . . . if the applicant was found to have been an insurable risk at the time of the medical examination."[20] Prudential argued that "the medical examination required by Part II of the application for insurance is a condition precedent to liability; that insurability can not fairly be determined without such examination."[21] The court rejected this "strict contract law"[22] approach, adopting instead the policy approach of other cases which had dealt with the condition precedent issue, notably *Allen v. Metropolitan Life Insurance Co.*[23] The court stated:

> A conditional receipt tends to encourage deception. We do not mean to imply affirmative misconduct by the soliciting insurance agent. We suggest only that if nothing is said about the complicated and legalistic phrasing of the receipt, and the agent accepts an application for insurance together with the first premium payment, the applicant has reason to believe that he is insured. Otherwise, he is deceived.[24]

Based on this assessment of the relative positions of the parties, the *Lamme* court held that a temporary insurance contract was created, subject to the company's rejection of the application,[25] a condition subsequent. The court realized that this construction could cause some hardship to the insurance company since uninsurable applicants could occasionally obtain life insurance,[26] but it found this possibility unpersuasive: "[W]e think that the policy considerations heretofore expressed carry the greater weight. The life insurance

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[19]*Id.* at 148 n.3, 425 P.2d at 347 n.3.

[20]*Id.* at 148, 425 P.2d at 347.

[21]*Id.*

[22]*Id.*

[23]44 N.J. 294, 208 A.2d 638 (1965). The *Allen* court stated that insurance policies "are not ordinary contracts, but are 'contracts of adhesion' between parties not similarly situated." *Id.* at 305, 208 A.2d at 644.

[24]83 Nev. at 149, 425 P.2d at 347-48.

[25]*Id.*, 425 P.2d at 348.

[26]*Id.*

companies may still write 'COD' insurance, or . . . choose to assume the risk sometimes involved in the use of the conditional receipt."[27]

The decision of the Nevada court thus appears to have been grounded on public policy: Insurers may not use complex, legalistically phrased receipts to avoid liability. A contract phrased in complex, legal language, coupled with a lack of knowledge or understanding on the part of the applicant suggests unconscionability, a theory that may underlie the decision in *Allen v. Metropolitan Life Insurance Co.*,[28] a case cited in *Lamme* prior to its resolution of the public policy question.

Allen also arose out of a life insurance sale in which a complicated receipt was used. In *Allen*, the applicant had applied for a $12,000 policy, given the soliciting agent a check for the amount of the first annual premium, and received a conditional receipt which read:

> *If the amount received on this date is equal to the full first premium on the policy applied for* and (1) the application as originally submitted is approved at the Company's Home Office for the policy applied for, either before or after the death of the Life Proposed, then in such circumstances the policy applied for will be issued effective as of this date . . . .[29]

In construing this conditional receipt, the New Jersey Supreme Court pointed out that a literal reading of the receipt "gave no interim protection at all in the absence of an approval by the company at its home office either before or after death."[30] It is important to note that this receipt made the issuance of the policy dependent upon *approval* by the company, and not upon *insurability* of the applicant. *Allen* thus deals with an "approval" receipt rather than an "insurability" receipt, as was the case in *Lamme*[31] and *Kaiser*.[32] As described by the court in *Lamme*, the approval receipt "usually recites that coverage shall be in force from a specified date provided the application is approved as applied for at the home office of the insurance company,"[33] whereas the insurability receipt "provides that insurance coverage shall be effective as of a specified date provided the company is satisfied that on such date the applicant was an insurable risk under the company's underwriting rules for the

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[27] *Id.*
[28] 44 N.J. 294, 208 A.2d 638 (1965).
[29] *Id.* at 297, 208 A.2d at 639.
[30] *Id.* at 304, 208 A.2d at 643.
[31] *See* text accompanying note 19 *supra*.
[32] *See* text accompanying note 8 *supra*.
[33] 83 Nev. at 147, 425 P.2d at 347.

policy applied for."[34] An approval receipt is more likely to be unconscionable or illusory than an insurability receipt because insurability is an objective standard that can be determined without regard to approval or rejection of the application by the company.

The *Allen* court also found that the conditional receipt was ambiguous, or rather, that it "would not be unambiguous to the average layman for whom it was intended."[35] This finding was in response to the company's claim that despite the literal terms of the receipt, which stated that coverage would be provided only if the application were approved,[36] the company would have granted coverage if the applicant had been insurable. As the court pointed out, such an interpretation was not evident from the terms of the receipt.[37] Having found that the receipt was ambiguous, the court resolved the ambiguity against the insurance company:

> The company is expert in its field and its varied and complex instruments are prepared by it unilaterally whereas the assured or prospective assured is a layman unversed in insurance provisions and practices. . . . Thus we have consistently construed policy terms strictly against the insurer and where several interpretations were permissible, we have chosen the one most favorable to the assured.[38]

The court in *Lamme* did not specifically refer to ambiguity or unconscionability, but these considerations seemed to underlie *Lamme*'s reference to the complexity of insurance contracts and the inequality of expertise between the company and the public.[39] Unlike the insurance company in *Allen*, the company in *Lamme* neither claimed that the provisions of the receipt included terms not expressly found in the written instrument nor attempted to defend a receipt which made insurance coverage dependent upon the subjective approval of the application. Rather, the receipt given to Lamme clearly

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[34]*Id.* at 148, 425 P.2d at 347.

[35]44 N.J. at 304, 208 A.2d at 643.

[36]Compare this provision with the terms of the receipt in *Kaiser*, 339 N.E.2d at 600, where the contract was obviously conditioned upon insurability.

[37]44 N.J. at 304, 208 A.2d at 643. For a criticism of the *Allen* decision, see Fortunato, *supra* note 1, at 20-21. Where there is no actual ambiguity, courts have found "constructive ambiguity." *See* the characterization of Ransom v. Pennsylvania Mut. Life Ins. Co., 43 Cal. 2d 420, 274 P.2d 633 (1954) in Morgan v. State Farm Life Ins. Co., 400 P.2d 223, 224 (Or. 1965). *See also* Murphy, *The Conditional or Binding Receipt Today*, [1965] PROCEEDINGS OF THE LEGAL SECTION OF THE AMERICAN LIFE CONVENTION 76, 82-85.

[38]44 N.J. at 305, 208 A.2d at 644.

[39]83 Nev. at 148-49, 425 P.2d at 347.

made coverage dependent upon the objective finding of insurability.[40] The *Lamme* court's reliance upon *Allen*, therefore, was misplaced.

The Indiana court in *Kaiser*, through its reliance upon *Lamme*, also applied the *Allen* theories to a case involving an insurability receipt. Thus, the same criticism is applicable: The dangers of ambiguity and unconscionability that are likely to be present in a case involving an approval receipt should not be an issue in a case such as *Kaiser*, involving an insurability receipt. Moreover, in announcing the blanket rule that "[a]ny conditions contained in the receipt are to be treated as conditions subsequent,"[41] the court did not recognize that the application of the condition precedent theory is entirely appropriate to insurability receipts. If an insurability receipt is used, the company should be under an affirmative duty to make a good faith effort to determine if the applicant was insurable according to the company's underwriting rules at the time the application was completed and the receipt given. If the applicant is found to have been insurable, the condition precedent is met. On the other hand, the application of the condition precedent theory to approval receipts does not place as strong a duty on the insurer, since the only action it would be required to take would be to approve or reject the application. The company would have no duty to continue to investigate the applicant's insurability. Such a result would be unconscionable.[42]

Kaiser also drew upon the decision in *Service v. Pyramid Life Insurance Co.*[43] In this case, Mr. and Mrs. Service had met with their local insurance agent and a regional manager of the company to purchase life insurance. They had each applied for $20,800 of life insurance, paid $31.34 for the first quarterly premium, and received a conditional receipt which had the following terms:

> "'That *if the company at its home office after investigation shall be satisfied that on the date hereof, or on the date*

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[40]*See* text accompanying note 19 *supra*.

[41]339 N.E.2d at 604.

[42]The general rule has been that if an insurability receipt is used, insurability is a condition precedent to the formation of the contract; if an approval receipt is used, the company's approval is a condition precedent. Annot., 2 A.L.R.2d 943, 964, 986 (1948). The safest position for the insurer to take is that insurability is determined as of the date specified in the receipt, and not at some later date. If the insurer agrees to issue a policy to an applicant whose health has deteriorated after the date of the application and medical examination, but who was an insurable risk on the latter of those two dates, rather than insisting that insurability must be present until delivery of the policy itself, he may avoid claims of unconscionability. The purpose of insurability receipts should be to "freeze" the applicant's status from the time of the application and medical examination to the time of actual delivery of the policy. *See* Annot., 2 A.L.R.2d 943, 988-92 (1948); Fortunato, *supra* note 1, at 21-22.

[43]201 Kan. 196, 440 P.2d 944 (1968).

> *of the medical examination for such insurance, whichever is later*, each person proposed for insurance was insurable and entitled under the company's rules and standards to insurance on the plan and for the amount applied for at the company's published rates corresponding to the age of each person proposed for insurance, *the insurance protection applied for shall by reason of such payment . . . take effect from the date hereof or from the date of such medical examination, whichever is later.*'"[44]

At the time the application was completed and the check for the first premium was tendered, Mrs. Service had asked the regional manager if Mr. Service would be covered. The regional manager had told her that Mr. Service *"was covered upon payment of the first premium."*[45] The application, medical examination, and check for the first premium had all been received by the company by July 7, 1964. The trial court found: *"By July 16, 1964, the defendant company was satisfied that on the date of the application the said Gerald W. Service was insurable and entitled under the company's rules and standards to insurance on the plan and for the amount applied for."*[46]

Gerald Service died in an automobile accident on July 21. The next day, the local insurance agent telephoned the company, spoke to an officer of the company, and was told that *"everything is in order."*[47] The local agent relayed this information to Mrs. Service and told her that the insurance proceeds would be paid.

In denying liability, the company apparently claimed that Mr. Service was not insurable. At trial, the company tried to establish that the applicant had a history of several medical disorders which had not been disclosed in the application or on the medical examination form.[48] There was evidence that the company had informed the agent on July 16 that both Mr. and Mrs. Service's policies were ready to be issued, except for a discrepancy in Mrs. Service's date of birth.

It would seem, therefore, that the trial court's finding that Mr. Service was insurable could easily have been upheld. Consequently, the condition set forth in the receipt would have been met and a contract to insure would have been formed. Both the trial court and the supreme court of Kansas, however, found that a contract had been formed by virtue of agency principles. The supreme court held that the regional manager had sufficient apparent or implied

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[44] *Id.* at 199, 440 P.2d at 948.

[45] *Id.*

[46] *Id.* at 199-200, 440 P.2d at 949.

[47] *Id.*

[48] *Id.* at 215, 440 P.2d at 960.

authority to create an oral contract of insurance, and that the applicants had relied on his statement that coverage was effective immediately upon payment of the first premium.[49] Although the decision of the trial court may have been supportable on the agency theory alone,[50] the reviewing court also discussed the nature of the conditional receipt.

The court began its discussion by pointing out that although the wording of receipts used by various companies may be similar, each receipt "must be individually interpreted to give [it] the effect which the parties intended . . . . The fundamental question is: What was their intention?"[51] In answer to this question, the court implied, but did not decide, that insurability had been the condition intended by the company.[52] The court stated, however, that "if the conditions imposed by the 'conditional receipt for first premium' are construed as conditions precedent, they must be regarded as having been waived by the regional manager."[53] This interpretation of the facts could have resulted in a decision based upon the fact that a valid condition precedent, insurability, had been waived by an agent having apparent or implied authority to do so. Nevertheless, the court questioned the validity of the receipt itself:

> If it cannot be said upon interpretation of this binding receipt that Mr. Service was insured from the date of the binder, or medical, until a formal policy was issued or the risk declined by the insurance company, then it must be said this binding receipt is ambiguous, and, if so, it should be construed against the insurance company, it having been drawn up and issued by the agents of the insurance company upon its printed form.
>
> If there was to be no contract of insurance in any event until the application was approved, and a policy issued thereon, it would seem entirely immaterial to the insured whether the contract related back to the date of the application (or medical) or not. . . . The chief object of the provision

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[49] *Id.* at 209, 440 P.2d at 955-56.

[50] *Id.* The agent's authority to bind the company by his statements is frequently an issue in conditional receipt cases. *See* Fortunato, *supra* note 1, at 11-12; Murphy, *supra* note 37, at 99.

[51] 201 Kan. at 211, 440 P.2d at 957.

[52] *Id.* at 213, 440 P.2d at 958. The receipt recited the following condition:

> [I]f the Company at its Home Office after investigation shall be satisfied that *on the date hereof, or on the date of the medical examination* for such insurance, whichever is later, each person proposed for insurance was *insurable* . . . the insurance protection applied for shall . . . take effect from the date hereof or from the date of such medical examination, whichever is later.

Id. at 211, 440 P.2d at 957.

[53] *Id.* at 214, 440 P.2d at 959.

> would, therefore, seem to be to enable the insurance company to collect premiums for a period during which there was in fact no insurance, and consequently no risk.[54]

The above quotation refers to *approval* of the application. Whether or not the application is approved by the insurance company is immaterial in a case involving an insurability receipt. The pertinent issue with insurability receipts is whether or not the applicant is an insurable risk. Therefore, the court's statement that the "chief object of the provision . . . [is] to enable the insurance company to collect premiums for a period during which there was in fact no insurance"[55] lacks some validity when applied to this case.

The *Service* court also discussed the problem underlying the enforceability of conditional receipts—whether the applicant receives a benefit in consideration for paying the premium in advance:

> [U]nless the insured was to be protected against death during the interim period there would be no advantage to him in paying his premium in advance. If the company did not intend that there should be insurance effective pending the date of the application . . . and the date of the approval of the risk and the issuance of the policy, . . . the insured would be paying for something which he did not receive.[56]

Once again, the court was using logic properly applicable to an approval receipt in a situation involving an insurability receipt. Furthermore, the court failed to recognize the independent value of the promise by the company to grant insurance on the basis of insurability and, more importantly, of the promise to make an objective determination of insurability. If it were true that by paying an amount equal to the initial premium and receiving an insurability receipt the applicant received nothing, consideration on the part of the company would indeed fail because the promises contained in the conditional receipt would be illusory. Such a contract would not meet the reasonable expectations of the applicant.

The intent of companies using insurability receipts seems clear from an objective reading of the receipts. The intent is to grant immediate insurance protection to the applicant if, and only if, he is an insurable risk. While this intent is clearly not the same as granting unconditional, immediate insurance coverage, neither is it the illusory promise that decisions such as *Service* would seem to indicate. The promise to grant immediate coverage dependent upon insurability of the applicant has intrinsic value, apart from the value

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[54] *Id.*

[55] *Id.* at 214-15, 440 P.2d at 959.

[56] *Id.* at 214, 440 P.2d at 959.

of the promise to grant coverage for a definite period of time after issuance of the policy. The applicant is insured before the policy is issued, contingent upon an objective determination of insurability, and is assured that the standard for determination of insurability will not change after the premium is paid. Although the value of the promise conditioned on insurability may be difficult to measure, mere difficulty of measurement should not invalidate the promise. While the value of the promise conditioned on insurability may not be precisely equal to the amount paid for the first premium, that amount seems as appropriate a measure of the value of the promise as any other. Furthermore, if the applicant is insurable, the insurance company is entitled to be compensated at its regular premium rates for having assumed the risk from the time the application was submitted until the time the policy is issued.[57]

The average insurance applicant cannot reasonably expect an insurance company to assume full, unconditional liability without first making an investigation into the applicant's health. The insurance-buying public probably understands that only reasonably healthy people can purchase life insurance at standard rates and that physical examinations are often required. A reasonable person could not expect the results of a physical examination to have no effect on a company's decision to offer insurance.[58]

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[57]Crowe had a similar criticism of the *Allen* court's interpretation of the receipt:

> It seems to me that the opinion in the *Allen* case includes language which may become the basis for an undesirable departure from the basic principles of contract law . . . . The court seems to approach the problem as if the advance payment of premium is to buy interim coverage and nothing else, and that the applicant has paid something for nothing if the coverage is not extended. This is not true. If there is no coverage . . . because the applicant is not insurable (insurability form of receipt), the entire premium is returned in full to the applicant so that he is made whole and he has not paid "something for nothing," and if he has no coverage, neither has he any cost.

Crowe, *supra* note 1, at 60-61.

Fortunato characterizes the benefit conferred by insurability receipts as a "freeze" of the applicant's status. Fortunato, *supra* note 1, at 21.

[58]Crowe commented on the *Allen* decision as follows:

> I think the court compounded the error of its erroneous assumption that the applicant "undoubtedly assumed" there was interim coverage by creating a very strong implication that, *as a matter of law*, payment of advance premium and receipt of a conditional receipt by an applicant entitles the applicant to expect that interim insurance is in force, *unconditionally*, until a policy is issued or the application is rejected. I submit that this implication is present in the opinion and that the same comes extremely close to a determination that as a matter of public policy, payment of advance premium results in interim coverage as, so reasons the court, the only just and equitable result fulfilling the reasonable expectations of the applicant. If my analysis is correct, the rationale of the *Allen* case involves abrogation of the law of contracts.

Crowe, *supra* note 1, at 61.

Service, therefore, is logically flawed. The court used concepts properly applicable to approval receipts rather than to insurability receipts. The court also failed to recognize the definite, although difficult to measure, benefit given to the applicant by the receipt. The Indiana court in *Kaiser* quoted extensively from those portions of the *Service* decision dealing with the question of consideration on the part of the company.[59] Thus, the Indiana court apparently failed to distinguish between an approval receipt and an insurability receipt. Furthermore, the court did not consider the possibility that a promise to insure conditioned upon insurability has some value.

The *Kaiser* court also discussed an Indiana case, *Western & Southern Life Insurance Co. v. Vale*.[60] *Vale* concerned an application for a $761 industrial life insurance policy. The receipt stated, in part: "Provided the insured be in sound health . . . on the date of said application, the company's liability under such policy, *if and as issued*, shall commence as of the date of said application."[61] The applicant could not read, but the soliciting agent told the applicant that

> if he got a limb cut off or an eye put out he would be paid one-half the amount in money and be given a paid-up policy for life; that the receipt was just as good as the policy; and that the insurance was in effect from the date of the receipt.[62]

The applicant suffered the loss of his left hand and sued on the contract of insurance.

The quoted receipt in *Vale* did not expressly provide for coverage based on insurability. Coverage was predicated instead upon the phrase "if and as issued."[63] This language apparently meant that if the terms of the receipt were upheld, the company could refuse coverage by merely refusing to issue the policy. Indeed, the company's witness testified that the applicant was physically a satisfactory risk and that issuance of the policy had been delayed because of doubt that the applicant could afford the premium. The court discussed the rule in some jurisdictions that no insurance was effective until actual approval by the company,[64] as well as decisions in other jurisdictions that recognized the unfairness of allowing companies to deny liability through the use of approval receipts.[65] In

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[59]339 N.E.2d at 601-02.

[60]213 Ind. 601, 12 N.E.2d 350 (1938). The court noted that neither *Vale* nor any other Indiana case was directly on point. 339 N.E.2d at 602.

[61]213 Ind. at 605, 12 N.E.2d at 352 (emphasis added).

[62]*Id.* at 607, 12 N.E.2d at 352.

[63]*Id.* at 605, 12 N.E.2d at 352.

[64]*Id.* at 608-09, 12 N.E.2d at 353.

[65]*Id.* at 609-10, 12 N.E.2d at 353-54.

support of its holding that approval receipts were unfair when applied to the situation in *Vale*, the court stated:

> It is inconceivable, in the face of all the circumstances, that appellee could have understood and believed that under no circumstances was he insured until after the acceptance of the application. The contract to insure for the period before acceptance of the application may have been qualified or conditioned, but the company cannot be permitted to say that under no conditions or circumstances was it liable . . . . It must be concluded that the applicant understood the contract to mean that he was insured if his representations were true . . . . Since no other reasonable construction is suggested, the agreement must be construed as intending that he be insured for the period, if reasonably insurable.[66]

Thus the court recognized that a receipt could grant immediate coverage, conditioned on the insurability of the applicant. The *Vale* court also found that the applicant, although illiterate, understood that coverage prior to approval of the application was conditioned upon insurability: "[T]he company has represented to the applicant that it has become *conditionally* liable . . . [and] the ordinary applicant . . . would be led to believe that he is *conditionally* insured."[67] It seems reasonable to assume that a literate applicant could also understand the terms of a clearly worded and unambiguous receipt.

When the *Kaiser* court discussed the *Vale* decision, it did not use the material quoted above. Instead, it quoted language discussing the unconscionability of allowing a company to say that it was not bound "to give anything whatever."[68] The *Kaiser* court failed to understand the difference between a company giving a conditional acceptance and giving nothing. According to *Kaiser*, the *Vale* court had refused "to permit the insurer to say that it had not bound itself,"[69] a statement which may be literally true, but is not an accurate summary of the holding in *Vale*. *Vale* expressly recognized that an insurance company could bind itself conditionally, yet the *Kaiser* court did not recognize that such conditional coverage was possible. Instead, the court based its decision upon the *Lamme* and *Service* decisions,[70] holding that whenever a conditional receipt is supported by consideration, an unconditional contract is created.[71]

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[66] *Id.* at 612-13, 12 N.E.2d at 354-55.
[67] *Id.* at 611, 12 N.E.2d at 354 (emphasis added).
[68] 339 N.E.2d at 604.
[69] *Id.* at 602-03.
[70] *Id.* at 604.
[71] *Id.*

The holding in *Kaiser* is an unnecessary restriction on the power of a life insurance company to limit its liability. First, the court in *Kaiser* relied upon the *Lamme* decision that the receipt in question was invalid due to its complicated and legal phraseology,[72] yet an objective reading of the receipts in both *Lamme* and *Kaiser* raises the question of whether either receipt can be reasonably characterized as complicated and legalistic. Second, the *Kaiser* court did not recognize that the court in *Service* used concepts properly applicable to approval receipts when it was considering an insurability receipt. This confusion of the two separate concepts results from a failure to appreciate that the promise to grant insurance conditioned on insurability contains sufficient consideration to prevent an illusory contract. Taken together, neither *Lamme* nor *Service* interpreted the receipt to fairly represent the intentions of both parties. The Indiana court, therefore, should not have placed heavy reliance upon these two cases. Rather, the court of appeals should have begun with the decision in *Vale*, which recognized the fairness of conditional acceptance, and applied the reasoning in that case to the facts in *Kaiser*.

III. Kaiser's Progeny

The *Kaiser* opinion was reinforced by another court of appeals decision during the same year. *Monumental Life Insurance Co. v. Hakey*[73] arose out of a familiar fact situation. A Monumental agent had met with Mr. and Mrs. Hakey on April 14, 1972, helped Mr. Hakey complete an application for life insurance, advised him that a physical examination might be necessary, received a premium from him, and issued a conditional receipt. The applicant died as a result of an accident on April 29, two days before the company had prepared its formal request for a physical examination. After the company learned of the death, it cancelled the application and refunded the premium. Some testimony indicated that the agent had told Mr. Hakey that he was covered.

The company defended the suit brought by the beneficiary on the ground that no contract existed because there was an uncompleted condition precedent. Since the opinion does not reproduce the wording of the conditional receipt, it is not possible to ascertain whether it was an approval receipt or an insurability receipt. Nevertheless, the court's handling of the company's claim makes this determination unnecessary. The court quoted briefly from *Kaiser*, and then resolved the issue by stating: "Company did not notify decedent of the

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[72]*See* text accompanying note 24 *supra*.

[73]354 N.E.2d 333 (Ind. Ct. App. 1976).

necessity for a medical examination in decedent's lifetime; Company accepted consideration; and Company issued a receipt. A contract for insurance was created."[74] By using *Kaiser* as a basis for holding that any conditions contained in the receipt were to be treated as conditions subsequent,[75] the *Hakey* court did not need to determine whether Mr. Hakey was insurable. The court apparently made no investigation into the *policies* underlying *Kaiser*. Had it done so, or had counsel for the company properly presented arguments in opposition to *Kaiser*, the court might have discovered the logical flaws in the *Kaiser* opinion. In *Hakey*, as in *Kaiser*, the court did not recognize that an insurability receipt contains a conditional promise to insure and that the consideration advanced by the applicant applies to this independent promise as well as to the promise to pay death benefits contained in the policy itself. It would seem that, whether the receipt in *Hakey* was an approval or an insurability receipt, the court's analysis of the issues was incomplete.

The latest decision in Indiana dealing with conditional receipts is *Meding v. Prudential Insurance Co. of America*.[76] The federal district court, applying Indiana law, failed to distinguish between approval and insurability receipts, and to discern differences among conditions imposed by insurance companies through the use of conditional receipts. The facts in this case were not in dispute and follow the familiar pattern. An application had been completed, a premium submitted to the company, and a medical exam requested. The applicant died before completion of the medical examination. The sole issue before the court on the plaintiff's motion for summary judgment was whether the conditional receipt created a contract of life insurance by virtue of the payment of the premium and acceptance of the premium by the company.[77]

The court observed that historically there have been two theories for conditional receipts—a condition precedent theory and a condition subsequent theory. According to this court, under the condition precedent theory no contract exists until acceptance by the company, whereas under the condition subsequent theory, the contract becomes effective on the date of prepayment, subject to the company's right to reject.[78] The court's characterization of the two theories, however, was incorrect. The opinion does not set forth the terms of the receipt, but since insurability seems to have been in issue, the receipt must have been of the insurability type. The court referred, however, only to the condition of acceptance or rejection

[74] *Id.* at 335.
[75] *Id.* at 334-35.
[76] 444 F. Supp. 634 (N.D. Ind. 1978).
[77] *Id.* at 635.
[78] *Id.*

by the company. Once again, this is an example of the use of the approval receipt theory to interpret an insurability receipt. Correctly applied to insurability receipts, the condition precedent theory means that no contract is formed unless the applicant is determined to be insurable, whereas the condition subsequent theory means that the contract is formed immediately upon payment of the premium, with the lack of insurability being a condition that would allow the company to cancel the contract. Under the condition precedent theory, the company is liable during the interim between the application and a determination of whether the applicant is insurable only if the applicant is determined to be insurable. Under the condition subsequent theory, however, the company is liable during the interim whether the applicant was insurable or uninsurable.

The *Meding* court mentioned the decision in *Vale*, but it summarized the decision in *Kaiser* as representing "the strong public policy in Indiana which prohibits insurers from accepting premiums and then conditioning the receipts to prevent the insurer from incurring any risk during the period which it retains an applicant's premium . . . ."[79] *Hakey* was characterized as having summarily affirmed *Kaiser* and adopted the condition subsequent theory.[80] Taken together, the opinions in *Hakey* and *Kaiser* led the *Meding* court to observe: "To allow insurers to disclaim liability during the interim period before acceptance or rejection of applicants would enable insurance companies to collect premiums for a period during which there was in fact no insurance, and consequently no risk involved. In short, there is no *quid pro quo*."[81] The court's observation may be literally true; there would be no *quid pro quo* if insurance companies disclaimed all liability prior to acceptance or rejection. Where an insurability receipt is given, however, the insurer does not disclaim all liability. On the contrary, the insurer admits to conditional liability.

IV. An Alternative Approach

Before granting the plaintiff's motion for summary judgment, the *Meding* court distinguished *Thorne v. Aetna Life Insurance Co.*[82] In *Thorne*, the applicant had completed the application, paid the agent, and received a conditional receipt stating that coverage would be effective as of the date of the medical examination "provided the Company shall be satisfied that on said date the applicant was insurable as a standard risk . . . ."[83] The applicant had repeatedly

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[79]*Id.* at 636.
[80]*Id.*
[81]*Id.* at 636-37.
[82]407 F.2d 809 (7th Cir. 1969), *aff'g* 286 F. Supp. 620 (N.D. Ind. 1968).
[83]407 F.2d at 810.

broken appointments for his physical examination. He died in an airplane crash without ever having taken his examination. The district court concluded that the contract was never formed,[84] and the circuit court affirmed.[85] The district court discussed both *Vale* and *Lamme* and, although it apparently agreed with the policies expressed in those cases, found that those policies did not preclude a finding in favor of the insurer.[86] Interestingly, the district court distinguished *Lamme* since *Lamme* found that the conditions in the receipt were not understandable "by the *ordinary* applicant, *absent an explanation of their meaning.*"[87] The applicant in *Thorne* was not an ordinary applicant. He was a "man of considerable business acumen and experience"[88] who had been informed that he was probably not a standard risk[89] and that he would not be covered unless the physical exam was completed.[90] Clearly, there was no question of misunderstanding on the part of the applicant in this case.

The district court also determined that the terms of the conditional receipt should have been construed to mean that if the applicant was insurable, coverage would have been in effect.[91] In other words, the condition precedent to formation of the contract was not whether the examination was taken or whether the company was satisfied as to the applicant's insurability, but whether the applicant was in fact insurable by an objective standard. The district court noted that such an interpretation was the only one "which does substantial justice both to the applicant and to the company."[92] The court also stated: "Similar results have been reached in a number of well-reasoned cases generally following the principles announced in *Vale*."[93] The circuit court, on the other hand, would not have allowed the plaintiff to show that the applicant was insurable. Rather, it held that in the absence of the required medical exam, the applicant was not covered because he had made a determination of insurability impossible by his refusal to take the examination.[94] The circuit court expressly declined to decide "whether Indiana law requires that a similarly situated plaintiff be permitted to show that the deceased was insurable even though he did not take a medical examination."[95]

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[84]286 F. Supp. at 624.
[85]407 F.2d at 811.
[86]286 F. Supp. at 625.
[87]*Id.*
[88]*Id.* at 623.
[89]*Id.*
[90]*Id.* at 622.
[91]*Id.* at 626.
[92]*Id.*
[93]*Id.* at 626 n.5.
[94]407 F.2d at 811.
[95]*Id.*

As the *Meding* court observed, the facts in *Thorne* and *Meding* are distinguishable.[96] The applicant in *Meding* had not broken several appointments for his medical examination and there was no evidence that he had been informed there was no coverage without an examination. The applicant in *Thorne* had been advised that he was not a standard risk, whereas some evidence in *Meding* suggested that the applicant had been insurable.[97] Even so, the decision by the circuit court in *Thorne* expressly left open the question of whether proof of insurability would be necessary for a beneficiary to recover, while the district court's decision suggested an actual need for such proof.[98]

Even though *Thorne* preceded *Kaiser* by several years, nothing in *Kaiser* indicates that the court considered *Thorne* in its decision. *Kaiser*'s failure to consider *Thorne* is regrettable because the district court's opinion succinctly states the reasons behind the theory that insurability is a condition precedent to liability on a conditional receipt.

V. Conclusion

It thus appears that life insurance companies doing business in Indiana may have difficulty in limiting their liability through the use of conditional receipts. Now that three courts have recently held against insurers, insurance companies will probably either settle questionable claims in which the conditional receipt is a factor or prohibit agents from accepting any payment with the application. Neither approach is desirable. The courts have attempted to shield the applicant from unfair clauses in conditional receipts which are ambiguously worded. The courts, however, have gone too far.

This Note has attempted to point out that both the insurer and the applicant receive benefits from the use of insurability receipts. The benefit to the insurer is that he is protected from liability on a risk against which he would not otherwise have chosen to insure. The benefits to the applicant are: He may receive a promise of immediate insurance protection, a promise he would not receive if the insurer were forced to instruct its agents not to accept a premium with the application and not to issue any kind of receipt; he is assured that the existing rate schedule for his underwriting classification will not change after the date of the application; and he is assured that the standard for insurability will not change.

If the receipts can be clearly worded and adequately explained,

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[96]444 F. Supp. at 637.

[97]*Id.*

[98]*See* text accompanying notes 88 & 91 *supra.*

an undertaking which may be very difficult, their use should be encouraged. The companies should endeavor to simplify the wording of these instruments and to ensure that their agents understand the exact terms of the receipt so that the public will not be deceived or misled.[99]

ALLEN A. BELL, JR.

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[99]Crowe suggests: (1) An industry-wide effort to simplify the wording of conditional receipts, (2) abandonment of the use of "approval" receipts, and (3) action to train agents

> so that they have a good understanding of "conditional receipts," and to stress that the word "conditional" means just what it says. The agents should be forcefully instructed to avoid any statements, in a sales presentation, which might tend to cause an applicant to believe that he would be unconditionally covered if he paid his premium with his application.

Crowe, *supra* note 1, at 62-63. There was a somewhat similar admonition in *Allen*:

> Much of the difficulty may be laid at the doorstep of the life insurance industry itself for, despite repeated cautions from the courts, it has persisted in using language which is obscure to the layman and in tolerating agency practices which are calculated to lead the layman to believe that he has coverage beyond that which may be called for by a literal reading.

44 N.J. at 302, 208 A.2d at 642.

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